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No. _____

In The Supreme Court Of The United States

STEPHEN J. HUFFMAN, Warden, *Petitioner*,

v.

RICHARD M. FRAZIER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given the "presumption of adequate performance" afforded to trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), may a federal court in a capital habeas case governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) adopt the contrary presumption, and thus grant habeas relief based solely on the court's willingness to presume that counsel inadequately investigated certain potentially mitigating evidence, despite the lack of any evidence regarding the scope of that investigation?

2. May federal courts sitting in habeas impose detailed rules of conduct governing trial counsel's strategic choices in a capital case that go beyond *Strickland v. Washington's* reasonableness approach?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The United States Sixth Circuit Court of Appeals Opinion is attached as Appendix A. The Sixth Circuit's Amended Opinion is attached as Appendix B. The Sixth Circuit's denial of rehearing en banc is attached as Appendix C. The United States District Court for the Northern District of Ohio's unreported Memorandum and Order are attached as Appendix D. The Ohio Supreme Court's denial of discretionary review is attached as Appendix E. The Ohio Eighth District Court of Appeals' unreported Opinion and Order in State post-conviction proceedings is attached as Appendix F.

JURISDICTION

The United States Court of Appeals issued its opinion on September 8, 2003. On February 17, 2004, this Court granted the Warden an extension of time to file his petition from February 26, 2004 to March 26, 2004. The Warden timely filed his petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This petition presents important questions regarding the presumption of adequacy to be afforded trial counsel's performance in a capital case. Although this Court has clearly articulated that there is a "presumption of adequate performance," *see Strickland v. Washington*, 466 U.S. 668, 699 (1984), the Sixth Circuit decision below eschewed this time-tested presumption and adopted a series of contrary ones. In so doing, the Sixth Circuit created a direct conflict, not only with this Court's precedent, but with the case law of at least three other Circuits as well. Even more troubling, the Sixth Circuit's decision here threatens to create rigid rules handcuffing trial counsel's strategic choices in capital cases to the detriment of their clients.

With its decision below, the Sixth Circuit has created two new and entirely unwarranted presumptions regarding trial counsel's performance. First, courts undertaking habeas review in the Sixth Circuit will now presume, absent evidence from the State to the contrary, that trial counsel failed to investigate potential mitigating evidence. Second, these courts will also make a virtually *irrebuttable* presumption that no reasonable attorney would choose a residual doubt defense if there is even a shred of evidence that the defendant could possibly have suffered some form of brain damage from a head injury. Instead, trial counsel must pursue the "brain damage defense" in the penalty phase, regardless of whether that strategy conflicts with the guilt phase defense or whether it will lead to the revelation of evidence concerning a defendant's criminal history.

In reaching these conclusions, the Sixth Circuit not only reversed this Court's traditional presumption of adequate representation, but it also substituted its own assessment of trial counsel's performance for that of the state court in derogation of its duty under AEDPA to respect state

court adjudications. While the Warden urges this Court to grant certiorari to resolve the issues and legal conflicts here, the Warden respectfully suggests in the alternative that the Sixth Circuit's clear error in applying *Strickland* may warrant summary reversal.

Moreover, in addition to running afoul of *Strickland*, the Sixth Circuit decision here also creates a direct conflict among the Circuits regarding the permissibility of a "residual doubt" defense. In particular, as noted above, the Sixth Circuit will now adopt a virtually irrebuttable presumption of ineffective assistance should trial counsel rely on residual doubt rather than presenting brain injury evidence. In the words of the court below, choosing residual doubt over brain injury evidence is "on its face irrational." *Frazier v. Huffman*, 343 F.3d 780, 796 (6th Cir. 2003), Appendix A at 24a. But, this presumption directly conflicts with decisions in both the Tenth and Eleventh Circuits. Each has held that reasonable counsel could elect to rely on a residual doubt strategy rather than present brain damage evidence. *See, e.g., Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (en banc); *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003). And, to the extent that the decision below requires trial counsel to rely on brain injury evidence above *all* else (*i.e.*, not merely instead of residual doubt)—even if it prompts negative rebuttal evidence—the Sixth Circuit's decision directly conflicts with Ninth Circuit case law as well. *See Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002).

Perhaps most disconcerting, the decision below directly undermines defense counsel's ability to effectively try capital cases. The decision mandates certain strategic choices governing trial counsel's conduct in a capital trial—notwithstanding that this Court has repeatedly indicated that trial counsel must remain free to fashion their own strategy in light of the unique circumstances each case presents. In light

of the Sixth Circuit's failure to follow this Court's precedent, as well as the Circuit split the decision below creates, the Warden respectfully requests this Court to grant his petition and reverse the Sixth Circuit's decision below.

STATEMENT OF THE CASE

A. Frazier Brutally Murdered His Stepdaughter.

Richard Frazier married Susan Bednarski in 1980, thereby becoming stepfather to Susan's eight year-old daughter Tiffany Skiba. In February 1986, Bednarski discovered that Tiffany was pregnant, and both women believed that Frazier was the father. Bednarski soon sought a divorce. And in October 1988, Medina County (Ohio) authorities indicted Frazier on two counts of rape.

Upon losing a lengthy legal battle over whether he had to submit to paternity testing in connection with his rape trial, Frazier rented a car and drove to Tiffany's grandparents' house in the early morning hours of November 5, 1990. After Tiffany's grandfather left at 5:00 AM to drive his wife to work, Frazier broke into the home through a basement window. He entered Tiffany's room and stabbed her nineteen times. Frazier slipped out of the house before Tiffany's grandfather returned fifteen minutes later.

Several facts connected Frazier to the crime: (1) Frazier's footprints in the yard; (2) Frazier's motive to commit the crime; (3) Frazier's treatment for a stab wound the morning of the murder, which was consistent with the victim's use of a knife to protect herself; (4) Tiffany's fear that Frazier would kill her; (5) Frazier's intimate knowledge of the layout of the Skiba's household; and (6) Frazier's statement to police that he wished to plead guilty to the rape and murder of Tiffany in return for a definite term sentence.

B. A State Court Jury Convicted Frazier, And He Received A Capital Sentence.

The Cuyahoga County (Ohio) Prosecutor's Office indicted Frazier on two counts of aggravated murder: felony murder and murder committed with prior calculation and design. Each count contained three capital specifications: (1) that the murder was committed during or immediately after an aggravated burglary; (2) that the victim was a witness and was purposely killed to prevent her testimony; and (3) that the murder was committed for the purpose of escaping trial and/or punishment for another offense committed by him (*i.e.*, rape). The State also charged a separate count of aggravated burglary.

At trial, Frazier defended on the theory that he did not commit the crime, arguing that there was no definitive evidence linking him to it. After an eight-day trial and three days of deliberations, however, the jury returned guilty verdicts on all three counts and also found that the three specifications under Counts One and Two were each proved beyond a reasonable doubt. After a mitigation hearing where Frazier made an unsworn statement denying his guilt and his attorneys argued for a life sentence based on residual doubt, the jury recommended death. The court followed this recommendation and imposed a capital sentence.

C. Frazier Litigated His Ineffective-Assistance-Of-Counsel Claim On The Merits In State Court.

Since his conviction, Frazier has exhaustively litigated alleged "errors" associated with his trial, his sentence, and his appeals. This includes the specific "error" on which the Sixth Circuit relied in granting habeas relief below—namely, ineffective assistance of trial counsel in the penalty phase. Although the post-conviction trial court that

first considered his claim found it barred on procedural grounds (*res judicata*), the post-conviction appellate court considered—and rejected—it on the merits. *See State v. Frazier*, unpublished opinion, Ohio Eighth District Court of Appeals, No. 71746 (Dec. 11, 1997), Appendix F.

Frazier first raised this claim as his first and second grounds for relief in his State post-conviction petition. He attached to his petition an affidavit from Dr. Sharon Pearson, a psychologist, in which she summarily asserted that trial counsel needed, but had failed to obtain, a psychologist to interpret the extensive documents that the trial mitigation specialist had gathered, which included records of "Frazier's childhood, family, school, employment, medical history and incarcerations." *See id.* at 171a-172a. Frazier also sought funds from the court for additional psychological testing. The trial court denied this request, and dismissed his petition, finding each of his asserted causes of action barred by *res judicata*. *See id.* at 172a.

After the trial court's denial, Frazier filed a motion for relief from judgment in which he argued that he had new evidence in the form of Pearson's supplemental affidavit. Dr. Pearson claimed that she had given Frazier unspecified tests and concluded that further testing by a neuro-psychologist would be beneficial in determining the existence of suspected brain damage. *See id.* at 173a. The trial court denied this motion as well.

On appeal, the Eighth District Court of Appeals affirmed the lower court's judgment. *Id.* at 181a. Rather than relying on *res judicata*, though, the appellate court reached the merits of Frazier's claims. With regard to Frazier's claim that trial counsel was defective in failing to pursue the brain damage theory, the court specifically found that counsel had been aware of the possibility of such a claim, but had strategically opted against pursuing that

defense. *Id.* at 179a. And it further found that this represented a reasonable choice. *Id.*

D. Frazier Pursued Habeas Relief, Asserting Thirty Grounds Of Relief Including The Ineffective Assistance Claim He Had Previously Litigated In State Court.

In December 1998, Frazier filed a federal habeas petition asserting thirty grounds for relief. *Frazier v. Mitchell*, Case No. 3:98 CV 2098 (Jan. 5, 2001), Appendix D at 63a. Frazier raised his ineffective-assistance-of-trial-counsel claims regarding the head injury evidence as his nineteenth and twentieth grounds for relief. *Id.* at 136a-145a.

On April 17, 2000, Frazier attempted to supplement the record with the report of his habeas psychological expert, Dr. Mack. The district court allowed expansion of the record over the Warden's objection. The Warden then deposed Dr. Mack, and the district court granted expansion of the record to include Dr. Mack's deposition transcript.

On January 5, 2001, the district court denied Frazier's petition. *See Frazier v. Mitchell*, Case No. 3:98 CV 2098 (Jan. 5, 2001), Appendix D. On the ineffective assistance claim, the district judge honored two state court findings: (1) counsel were aware of the underlying head injury; and (2) counsel's decision not to pursue that defense was strategic. *Id.* at 138a-140a (citing *Sumner v. Mata*, 449 U.S. 539, 545-46 (1981)). The judge also found that even if he could consider Frazier's federally-developed brain damage evidence (in the form of Dr. Mack's proposed testimony), it would make no difference because it was "essentially speculative[] and insufficiently favorable," particularly in light of the strong evidence that Frazier planned the killing as opposed to acting on impulse in a stressful situation. *Id.* at 140a.

In a split decision, the Sixth Circuit reversed the District Court's judgment. After reciting the *Strickland* standards for resolving the claim and noting that the Ohio courts rejected it on the first prong, the majority set out to examine the ineffective assistance claim *de novo*. The majority first found that since trial counsel were aware that Frazier had suffered a head injury in 1987, their alleged failure to investigate the injury further or present evidence of the injury was unreasonable. *Frazier v. Huffman*, 343 F.3d 780, 794 (6th Cir. 2003), Appendix A at 21a. The majority then found trial counsel's residual doubt strategy unreasonable because, according to the court, it was not a valid mitigator under Ohio law. *Id.* at 795, Appendix A at 22a.

After "conclud[ing] that trial counsel performed below an objective standard of reasonableness," *Id.*, Appendix A at 23a, the majority examined the state court's finding of a strategic reason for the defense strategy and rejected it out of hand: "We have concluded the opposite." *Id.* at 796, Appendix A at 23a. The majority then specifically disagreed with the state court's reasons for its finding. *Id.* at 800, Appendix A at 26a. And the majority finished its deficient performance analysis by finding the state court decision unreasonable because neither the state courts nor the State provided "any reason to explain or justify such a trial strategy." *Id.*, Appendix A at 26a.

For its prejudice analysis, the majority found that because the state court record contained "sufficient facts . . . to indicate the existence of evidence concerning Frazier's brain injury that could have been developed and presented to the jury," there was a reasonable probability of a different outcome. *Id.* at 797, Appendix A at 27a. The majority speculated that, in light of the injury evidence, counsel could have argued that Frazier did not plan to kill Tiffany when he snuck into the house—he only meant to confront her about

her rape charge and he killed on an impulse. *Id.* at 798-99, Appendix A at 28a.

Judge Batchelder dissented on the grounds that the claim was procedurally defaulted. *Frazier v. Huffman*, 343 F.3d 780, 802-07 (6th Cir. 2003) (Batchelder, J., dissenting), Appendix A at 36a-46a.

The Warden now seeks certiorari to address the conflicts the decision below creates both with this Court's precedent, and the law in the other Circuits, regarding the presumption of adequacy of counsel.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Decision Below Directly Conflicts With *Strickland*'s Presumption Of Adequacy In Ineffective-Assistance-Of-Counsel Cases And Thus Fundamentally Alters Habeas Litigation.

A. This Court Requires A Habeas Petitioner To Prove That Trial Counsel's Investigation Was Inadequate.

This Court in *Strickland v. Washington* found that the actions of trial counsel, both in developing trial strategy and in conducting investigation into the facts of a case, are afforded a strong presumption of adequacy. *See Strickland*, 466 U.S. 668, 690 (1984) ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable and professional judgment."). In particular, the Court in *Strickland* stressed that, in assessing counsel's effectiveness in investigating a case, counsel's judgments are "afforded a heavy measure of deference." *Id.* at 691. As such, this Court has consistently required a habeas petitioner

to *prove* that trial counsel's penalty phase investigation was inadequate in order to escape the "virtually unchallengeable" nature of counsel's selected strategy. *See id.* at 690-91 (describing counsel's strategic choices made after thorough investigation as "virtually unchallengeable").

The typical way for a habeas petitioner to meet his burden of proof is through the testimony of trial counsel concerning their investigation. *See, e.g., id.* at 678 (the habeas petitioner called his counsel to testify at the federal evidentiary hearing "to inquire into trial counsel's efforts to investigate and to present mitigating circumstances"); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (trial counsel testified at an evidentiary hearing); *Burger v. Kemp*, 483 U.S. 776, 788-96 (1987) (same); *Williams v. Taylor*, 529 U.S. 362, 373, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (trial counsel testified at a state evidentiary hearing regarding their investigation and confirmed that they did not investigate the mitigating evidence subsequently identified by Williams in his post-conviction litigation); *Bell v. Cone*, 535 U.S. 685, 692, 697-701 (2002) (counsel testified about their decision not to recall the petitioner and his sister in light of the fear that they would reveal petitioner's criminal history); and *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527, 2536, 2539-40, 156 L.Ed.2d 471 (2003) (the state courts found, based on trial counsel's testimony, that their mitigation investigation consisted solely of an interview with a psychologist and review of PSI and DSS records, which this Court held was an unreasonable limit on the investigation).[1]

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[1] Indeed, before *Wiggins*, the Sixth Circuit used to require such a record as well. *Compare Mason v. Mitchell*, 320 F.3d 604, 620 (6th Cir. 2003) (remanding for an evidentiary hearing because "in order for us to evaluate whether defense counsel rendered constitutionally ineffective assistance at sentencing, we must know more about the extent of counsel's investigation and preparation of mitigating evidence"), *with Frazier* and *Hamblin v. Mitchell*, 354 F.3d 482, 490, 492 (6th Cir. 2003).

In fact, only last year, this Court reinforced the importance of using counsel's testimony in resolving ineffective assistance of counsel claims in *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690 (2003). In allowing federal criminal defendants to raise ineffective assistance claims in § 2255 proceedings, this Court stressed that such proceedings were the only forum that would allow development of the facts necessary to evaluate counsel's performance:

> The evidence introduced at trial. . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.

Massaro, 538 U.S. at __, 123 S.Ct. at 1694. In fact, this Court suggested that it expects that counsel's testimony will be part and parcel of the record to be developed: "The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance." *Id.*

Where, as here, counsel's testimony is not part of the record, the presumption of adequacy is, if anything, even stronger. For example, in *Yarborough v. Gentry*, __ U.S. __,

124 S.Ct. 1, 5-6 (2003), this Court found that a defendant, relying on a post-trial record that did not include counsel's testimony, had to overcome an even more forceful presumption that trial counsel's strategy was reasonable. This Court there noted that this presumption "has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" *Id.* at 6 (quoting *Massaro, supra*). In light of the more forceful presumption of adequacy in *Yarborough*, the Court went on to summarily overrule the Ninth Circuit's conclusion that counsel's seemingly negative closing argument constituted deficient performance.

B. Instead Of Affording Counsel A Presumption Of Adequacy, The Sixth Circuit Presumed The Opposite.

Frazier has never sought any testimony whatsoever from any of his three trial attorneys concerning the scope and extent of their mitigation investigation. Thus, as *Yarborough supra* indicates, the presumption that trial counsel's investigation was adequate should have been strengthened. The Sixth Circuit, however, reversed this presumption of adequacy, and instead presumed that trial counsel had behaved unreasonably in allegedly failing to investigate Frazier's brain injury, thereby requiring the State to prove the contrary. Indeed, in at least four different passages from its decision, the Sixth Circuit alluded to the need for the State to prove adequacy of trial counsel, and not the other way around:

- We do not believe that it is reasonable to infer that a trial strategy, which is on its face irrational and *for which no justification has ever been produced*. .

> . . *Frazier*, 343 F.3d at 796, Appendix A at 24a (emphasis added);
>
> - *no reason at all has been adduced to justify the failure* of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. *Id.* at 797, Appendix A at 26a (emphasis added);
>
> - *Absent any reason to explain or justify such a trial strategy*, we conclude that the state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable. *Id.*, Appendix A at 26a (emphasis added).
>
> - The State has not challenged the contention that Frazier's trial counsel could have developed this information. . . . *Id.* at 794, Appendix A at 21a.

The court clearly expected the State to provide the explanation or justification for trial counsel's strategy. And since the court could not find such an explanation, it presumed that there was none.

Based on its own review of the record, the court then suggested three ways in which it felt trial counsel could have better investigated the brain injury: (1) by comparing the records with medical literature on brain damage; (2) by interviewing Frazier about the head injury and its effects on

him; and (3) by presenting the records to someone competent to evaluate them. *Id.* at 795, Appendix A at 21a-22a.

Underscoring the problem with the Sixth Circuit's approach (*i.e.*, reversing this Court's presumption of adequacy), here trial counsel may very well have undertaken one or more of the steps the Sixth Circuit described. There is simply no evidence in the record one way or the other. Given the lack of evidence, no one, including the Sixth Circuit, knows for certain what counsel did, especially with regard to the first two steps the court suggested. Admittedly, the record seems to confirm that counsel were unable to try the third option the court suggested as the trial judge denied their request for funds to hire their own psychologist. But even there, the possibility exists that counsel obtained a "free" review from experts retained by the State Public Defender's Office.[2] Without counsel's testimony on the matter, there is simply no way to tell from this record.[3] The

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[2] The local court psychiatric clinic recommended that counsel seek such aid from the Ohio Public Defender's Office rather than the clinic because the Public Defender's Office was more suited to providing the type of mitigation assistance required.

[3] In fact, the record tends to indicate that trial counsel indeed-investigated the brain injury and decided against using that evidence because of the risk involved in obtaining a negative psychiatric evaluation. That is, trial counsel attempted to obtain their own expert psychologist to assist counsel in their investigation and analysis of data. The trial judge denied this request and noted that trial counsel still had the option of seeking an independent evaluation from the court clinic. But the judge warned that such an evaluation was risky because the results of the evaluation—the good and the bad—would go to the prosecutor and the jury. Frazier's trial counsel declined this option for that very reason.

After the jury recommended the death sentence, defense counsel informed the court at the sentencing that they had developed information concerning Frazier's brain injury but that various legal considerations prevented them from presenting such evidence at the mitigation hearing.

only question is, in the absence of evidence, which way does the presumption of adequacy run? And, on that question, this Court's jurisprudence is clear. For the Sixth Circuit to reverse the traditional presumption and impute counsel's failure to investigate based on an incomplete record dramatically undercuts *Strickland* and its progeny. This clear failure to comply with *Strickland's* mandate, in and of itself, justifies a grant of certiorari, and may, the Warden respectfully suggests, even warrant summary reversal.

C. The Sixth Circuit's Decision Will Fundamentally Alter And Increase Habeas Litigation.

The Sixth Circuit's decision is problematic not only because it runs contrary to this Court's clear precedent on ineffective-assistance-of-counsel claims, but also because of the widespread impact that the decision will have, if left uncorrected, on habeas litigation. For instance, in light of the Sixth Circuit's decision, AEDPA's 28 U.S.C. § 2254(e) will be largely rendered null. Under § 2254(e), there is a presumption against granting a petitioner an evidentiary hearing on claims such as ineffective-assistance-of-counsel. *See* 28 U.S.C. § 2254(e).[4] Section 2254(e) makes clear that a

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See State v. Frazier, unpublished opinion, Ohio Eighth District Court of Appeals, No. 71746, p. 15 (Dec. 11, 1997), Appendix F at 179a.

[4] § 2254(e) provides:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

habeas petitioner's ineffective-assistance-of-counsel claim will be decided based on the record, and that an evidentiary hearing will be granted only in certain extraordinary circumstances. From the face of the statute, the twin goals behind this provision seem clear: (1) To force petitioners to raise ineffective-assistance-of-counsel claims and develop that record in the state courts—closer in time to counsel's alleged error; and (2) To remove from the federal district courts the burden of conducting evidentiary hearings on such claims.

But now because the Warden has the burden of proof on ineffective-assistance-of-counsel claims, any time a petitioner can raise a possible mitigating factor not presented by counsel, the Warden will be forced to request an evidentiary hearing in order to properly rebut the petitioner's claim. Thus, what the Sixth Circuit's decision does is to absolve habeas petitioners of their burden under § 2254(e), while simultaneously undermining the goals underlying that provision. Hearings will become a matter of course, and thus more resources will be consumed in discovery and evidentiary hearings in the district courts. Additionally, petitioners no longer have any incentive to develop the factual predicate to their claims in the state courts. In fact, habeas petitioners may actually have an incentive to *avoid* developing a record of their claims in state courts, and thus let any record of counsel's alleged misdeeds grow stale. A

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

stale record now benefits the petitioner and burdens the Warden. In other words, the Sixth Circuit has ensured that the Warden, and not the petitioner, will have to work—sometimes nearly twenty years after the fact—to recreate a record of counsel's action. *Cf. Martin v. Mitchell*, 280 F.3d 594, 615 (6th Cir. 2002) (no evidentiary hearing on ineffective assistance of trial counsel is necessary where counsel was unable to explain "why nearly 20 years had passed without an attempt to depose, interview, or otherwise contact Martin's trial counsel"). And if that record is too cold to recreate, the Sixth Circuit now says that a draw goes to the petitioner.

By undercutting the language and purpose of 28 U.S.C. § 2254(e), the "reverse presumption" adopted below threatens to swamp federal courts with a deluge of ineffective-assistance-of-counsel claims. This potentially endless stream of "second trials" over counsel's effectiveness was the very threat that led this Court to adopt the presumption of adequacy in the first place. *See Strickland*, 466 U.S. at 690.[5] In short, the decision below directly

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[5] This Court in *Strickland* noted the concerns with adopting a non-deferential standard in assessing counsel's performance:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

conflicts with *Strickland*, and threatens the entire habeas framework for ineffective-assistance-of-counsel claims. The Warden respectfully requests this Court to grant certiorari in order to address and resolve these problems.

II. The Sixth Circuit's New Rule That It Is Per Se Ineffective For Counsel To Rely On A Residual Doubt Strategy Over Brain Injury Evidence Conflicts With Decisions In The Ninth, Tenth and Eleventh Circuits.

A. Residual Doubt Is A Valid Mitigation Strategy.

Despite the Sixth Circuit's claim to the contrary, "'[R]esidual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" *Lockhart v. McCree*, 476 U.S. 162, 181, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986) (citation omitted). Legal scholarship buttresses this conclusion:

> "Residual doubt" over the defendant's guilt is the most powerful "mitigating fact." . . . The best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.

Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (footnote omitted) (comprehensive study on the opinions of jurors in capital cases). *See also* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty*

Strickland, 466 U.S. at 690.

Cases, 15 Am. J. Crim. L. 1, 28 (1988) ("The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied.").

B. Ohio Law Permitted Trial Defense Counsel To Pursue A Residual Doubt Strategy At The Time Of Frazier's Trial.

The Sixth Circuit dismissed the residual doubt strategy by retroactively applying a 1997 Ohio Supreme Court decision to Frazier's 1991 trial: "Furthermore, as both this court and the Ohio Supreme Court have noted, residual doubt is not a mitigating factor under Ohio law." *Frazier*, 343 F.3d at 795, Appendix A at 22a (citing among other authorities *State v. McGuire*, 80 Ohio St.3d 390 (Ohio 1997)).[6] Since counsel offered only Frazier's unsworn statement of innocence and their residual doubt closing arguments, the Sixth Circuit found as a "fact that Frazier's counsel failed to offer any evidence during the penalty phase that is recognized under Ohio law as mitigation." *Id.*, Appendix A at 23a.

But reviewing courts are bound to judge the deficient performance prong "as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The Ohio Supreme Court has recognized that as a matter of Ohio law it was perfectly

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[6] Although *McGuire* eliminates residual doubt as a mitigating factor under Ohio law, residual doubt still remains a valid and strong factor in those cases governed by the pre-*McGuire* standard. Indeed, a great number of pre-*McGuire* capital cases are still en route to the Sixth Circuit Court of Appeals. Moreover, the Sixth Circuit's decision here will continue to affect other states within the Sixth Circuit that recognize residual doubt as an appropriate mitigating factor. *See State v. Hartman*, 42 S.W.3d 44, 55-56 (Tenn. 2001) (recognizing continuing validity of residual doubt defense in Tennessee law).

legitimate to pursue a residual doubt strategy prior to the court's 1997 decision in *State v. McGuire*, *supra*. *State v. Smith*, 89 Ohio St.3d 323, 334, 731 N.E.2d 645, 656 (Ohio 2000) (finding that trial counsel were not ineffective in pursuing residual doubt strategy at penalty phase because the trial occurred in 1994, well before the *McGuire* decision), *cert. denied*, 531 U.S. 1167 (2001). Frazier's trial occurred some six years before the *McGuire* decision.

Trial counsel knew, and directly re-emphasized to the jury, that the guilt decision had been difficult for Frazier's jury to reach. Guilt phase deliberations spanned three days. So Frazier's trial counsel asked the trial judge to instruct the jury to consider residual doubt as mitigation. And the trial judge expressly gave such an instruction: "Under this category, defendant asserts that residual doubt of his guilt exists. *Residual doubt of a defendant's guilt may be considered in mitigation.*" (emphasis added).

The trial record and Ohio Supreme Court law flatly contradict the Sixth Circuit's finding of "fact" that Frazier's counsel presented no mitigation at trial.

C. Given The Legitimacy Of Residual Doubt As A Penalty Phase Strategy, The Sixth Circuit's Holding That No Reasonable Attorney Would Opt For It Over Potential Brain Injury Evidence Conflicts With The Tenth And Eleventh Circuits.

Despite the legitimacy of a residual doubt strategy under Ohio law in Frazier's case, the Sixth Circuit adopted a virtually irrebuttable presumption that is was ineffective assistance for counsel to rely on that strategy in the face of potential brain damage evidence. *See Frazier*, 343 F.3d at 794, Appendix A at 21a (stating that the court could "conceive of no rational trial strategy" justifying counsel's

choice). This per se rule directly conflicts with decisions in both the Tenth and Eleventh Circuits. According to both of these Circuits, but directly contrary to the decision below, pursuing residual doubt over brain injury evidence is *not* "on its face irrational." *See id.* at 796, Appendix A at 24a.

In *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764, 782, 788 (11th Cir. 2003), the Eleventh Circuit considered, *and rejected*, the approach the Sixth Circuit adopted here. There, like here, the habeas petitioner alleged that his trial counsel had been ineffective because they "did not adequately prepare for the sentencing phase of the trial, and relied solely on a reasonable doubt argument at sentencing which the jury had already rejected during the guilt phase." *Id.* at 787. In particular, the petitioner in *Parker* asserted that his counsel "should have presented mitigating evidence of his disadvantaged upbringing, alcohol and substance abuse, *psychological disorders, and brain damage*." *Id.* (emphasis added). Unlike the Sixth Circuit, however, which found that pursuing residual doubt over these other forms of mitigating evidence would be "on its face irrational," the Eleventh Circuit easily concluded that trial counsel in *Parker* "were not deficient". *Id.* In fact, the Eleventh Circuit, in language directly conflicting with the opinion below here, found that "[c]reating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but 'is perhaps the most effective strategy to employ at sentencing.'" *Id.* at 787-88 (*quoting Chandler v. United States*, 218 F.3d 1305, 1320 (11th Cir. 2000)). Simply put, *Parker* reflects a vastly different approach from the irrebuttable presumption of ineffectiveness adopted by the Sixth Circuit here.

The Tenth Circuit's en banc decision in *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (en banc) similarly conflicts with the opinion here. In *Bryan*, the petitioner challenged his counsel's failure to introduce evidence of

"organic brain syndrome" during the penalty phase. The Tenth Circuit, however, found that "the use of mental health evidence during the penalty phase would not have been effective following a guilt phase defense of actual innocence." *Id.* at 1220. Expert defense counsel testified that the introduction at the penalty phase of a theory that is inconsistent with a guilt phase strategy of innocence is the "kiss of death." *Id.* at 1223 n.22. *See also Haliburton v. Sec'y Dep't of Corrections*, ___ F.3d ___, 2003 U.S. App. LEXIS 17166, *33 (11th Cir., Aug. 21, 2003) (penalty phase evidence of "brain damage . . . can often hurt the defense as much or more than it can help").

The extent of the conflict created by the Sixth Circuit here is further evidenced by the fact that the ABA explicitly instructs capital trial counsel to avoid the very strategy the Sixth Circuit advocated in this case: "Consistency is crucial because, as discussed in the commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1059 (2003).

In sum, the Sixth Circuit's decision here directly conflicts, both as to reasoning and result, with the opinions from these other Circuits, as well as with the sage advice of the ABA. There is simply no way to square these other cases with the holding below that selection of a residual doubt strategy over a potential brain damage defense is "on its face irrational." *Frazier*, 343 F.3d at 796, Appendix A at 24a. And, in addition to creating a conflict among the circuits, the sweeping declaration by the court here gives too little credence to residual doubt strategies, demonstrates too much confidence in jurors' perception of brain damage evidence,

and affords absolutely no credit to the state court's finding that such a strategy was reasonable in this case. *See* 28 U.S.C. § 2254(d)(1).

D. The Sixth Circuit's Mandated Reliance On Brain Injury Evidence Harms Criminal Defendants And Conflicts With Decisions Of This Court And Of The Ninth Circuit.

Oftentimes use of brain injury evidence as a mitigating factor can actually prove harmful to a criminal defendant, as it likely opens the door to rebuttal evidence that undermines a defendant's case. In fact, this Court has repeatedly recognized the reasonableness of trial counsel's strategy of avoiding any mitigation theory that would allow the State to produce harmful rebuttal evidence. *See Burger v. Kemp*, 483 U.S. 776, 788-96 (1987) (counsel exercised reasonable professional judgment in deciding not to do an all-out investigation because of its limited potential value compared to the negative evidence that could have been elicited); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (counsel exercised reasonable professional judgment in avoiding testimony that the petitioner was nonviolent because it would have opened the door to damaging psychiatric testimony); *Bell v. Cone*, 535 U.S. 685, 692 (2002) (counsel's decision not to recall sister and call petitioner was reasonable in light of fear that they would reveal petitioner's criminal history); *Strickland v. Washington*, 466 U.S. 668, 699 (1984) (counsel reasonably feared that evidence of bad character, psychological analysis and criminal convictions would come in along with the proposed mitigation).[7]

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[7] As this Court has recognized the negative effect of opening up a defendant to damaging rebuttal evidence, the ABA has, as well, by codifying this rationale in their guidelines: "In determining what presentation to make concerning penalty, counsel should consider

The Ninth Circuit recently employed that very rationale in the context of a residual doubt strategy. In *Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002), the court held that trial counsel reasonably focused on a residual doubt strategy and declined to pursue drug use and mental capacity evidence because the latter theory would have allowed the State to introduce negative rebuttal evidence. *See id.* at 717 ("If the defense introduced evidence to suggest Williams's troubled family background or diminished mental capacity caused the offenses at issue, then the prosecution would probably present gang evidence to show that the offenses were part of Williams's gang lifestyle, not the result of any family problems or diminished mental capacity.").

The decision here—to the extent that the Sixth Circuit failed to consider the impact of rebuttal evidence against Frazier—directly conflicts with the Ninth Circuit's consideration of rebuttal evidence in determining the reasonableness of a residual doubt argument. In contrast to the Ninth Circuit's caution against using mitigation evidence that would likely produce negative rebuttal evidence—a decision that is entirely consistent with this Court's decisions and ABA guidelines—the Sixth Circuit incorrectly found here that Frazier "had everything to gain and nothing to lose by introducing evidence of his brain injury at the penalty phase of the case." *Frazier*, 343 F.3d at 796, Appendix A at 25a.

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whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1056-57 (2003). *See also Id.* at 1064 ("Finally, in preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible").

In fact, if Frazier's counsel had actually adopted the strategy the Sixth Circuit said was required, Frazier would have been blistered with damaging rebuttal evidence. The natural rebuttal to a brain injury theory would have been to show that Frazier had significant trouble controlling his actions *before* the 1987 head injury. That evidence—which Frazier's jury never heard—would have included:

- Frazier was involved in murders committed while he was a member of the Hell's Angels in the 1960's and 1970's;

- Frazier began molesting Tiffany in 1982, and the molestation graduated to sexual intercourse by 1984 or 1985;

- In 1969, Frazier had pled guilty to assault and battery, a charge that was reduced from the original manslaughter charge;

- In 1972, Frazier was convicted of marijuana possession;

- In 1977, Frazier was convicted of forgery and misuse of credit cards;

- In 1978, Frazier was arrested and sentenced for unauthorized use of a motor vehicle; and

- In 1986, Frazier was sentenced to prison for gun violations and crimes involving stolen motorcycle parts.

These acts would have completely undercut any positive impact from the speculative head injury evidence. And this evidence also would have wiped out any benefit counsel hoped to derive from residual doubt. To suggest that counsel *must* have introduced evidence of brain injury, regardless of the impact of any rebuttal evidence on Frazier, would have *produced* inadequate representation rather than prevented it.

Because the Sixth Circuit's rule adopting an irrebuttable presumption in favor of brain injury evidence is directly contrary to this Court's precedent, as well as decisions from other Circuits, and, in addition, actually harms criminal defendants, this Court should grant certiorari and reverse that decision.

E. The Sixth Circuit's Codification Of A Per Se Brain Injury Rule Establishes A Rigid Rule That Handcuffs Defense Counsel's Ability To Try Capital Cases.

The Sixth Circuit's decision to elevate brain injury evidence to a position of primacy in the universe of mitigation defenses not only creates legal conflict, but, more importantly, creates confusion for counsel that try capital cases. This Court in *Strickland* noted the need to stay away from bright line rules in assessing attorney performance. *See Strickland*, 466 U.S. at 688-689 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."). Yet, this is exactly what the Sixth Circuit did in its decision: it created a bright line rule of strategy that intrudes on counsel's ability to make tactical decisions. As the Court in *Strickland* prophesied, the Sixth Circuit's rule here will "distract counsel from the

overriding mission of vigorous advocacy of the defendant's cause." *Id.* at 689.

This Court should review the decision below because it creates a "performance checklist" in evaluating attorney performance. If the box indicating "brain injury" is not checked, then, notwithstanding the facts of the case or the overall strategy of trial counsel, counsel's performance will be deemed ineffective. On the other hand, if trial counsel seek to adhere to this rigid guideline, they may actually render ineffective representation by presenting a brain injury that is inconsistent with trial phase strategy or opening the door to negative rebuttal evidence. In either case, a defendant's right to effective counsel is jeopardized.

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition and reverse the Sixth Circuit's decision.

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March 26, 2004

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The Supreme Court Of The United States

STEPHEN J. HUFFMAN, Warden,

Petitioner,

v.

RICHARD M. FRAZIER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3122

RICHARD M. FRAZIER,
Petitioner-Appellant,

v.

STEPHEN J. HUFFMAN, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Toledo. No. 98-02098. James G. Carr, District Judge.

Argued October 15, 2002
Decided and Filed September 8, 2003

Before: BATCHELDER, CLAY, and GILMAN, Circuit Judges. GILMAN, J., delivered the opinion of the court, in which CLAY, J., joined. BATCHELDER, J. (pp. 34-42), delivered a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: John B. Nalbandian, TAFT, STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, for Appellant. Michael L. Collyer, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, for Appellee. ON BRIEF: John B. Nalbandian, Daniel F. Oberklein, James V. Schuster, TAFT, STETTINIUS & HOLLISTER LLP, Cincinnati, Ohio, David Paul Bradley, GALLAGHER, SHARP, FULTON &

NORMAN, Cleveland, Ohio, for Appellant. Michael L. Collyer, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, Henry G. Appel, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee.

OPINION BY: RONALD LEE GILMAN

OPINION

RONALD LEE GILMAN, Circuit Judge. Tiffany Skiba was stabbed to death on November 8, 1990. The grand jury in Cuyahoga County, Ohio indicted Richard M. Frazier on two counts of aggravated murder for the death of Skiba, each with three death-penalty specifications, and on one count of aggravated burglary. Frazier proceeded to trial in state court on August 5, 1991. The jury convicted him on all counts and subsequently recommended that he be sentenced to death. That recommendation was adopted by the trial judge.

After exhausting his direct appeals and state postconviction remedies, Frazier sought a writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254. He raised multiple grounds for relief, but primarily focused on claims of evidentiary error, prosecutorial misconduct, and ineffective assistance of counsel. The district court denied Frazier's petition, but granted him a certificate of appealability on all issues. For the reasons set forth below, we **REVERSE** in part the judgment of the district court, **GRANT** Frazier a conditional writ of habeas corpus that will result in the vacation of his death sentence unless the state of Ohio commences a new penalty-phase trial against him

within 180 days from the date that the judgment in this matter becomes final, and **REMAND** the case for further proceedings consistent herewith.

I. BACKGROUND

A. Factual background

Frazier married Susan Bednarski in 1980, thereby becoming the stepfather of Bednarski's eight-year-old daughter from a previous relationship, Tiffany Skiba. In February of 1988, Bednarski discovered that Skiba was pregnant. Both women believed that Skiba's pregnancy was the result of sexual abuse by Frazier. Bednarski sought a divorce. Skiba spoke to the local authorities in Medina County, Ohio. In October of 1988, Frazier was indicted in state court on two counts of rape and two counts involving other sex crimes. One month earlier Skiba had given birth to a son.

The state criminal court ordered Frazier to submit to a blood test to determine the paternity of Skiba's child. He appealed that order to the intermediate state appellate court and to the Ohio Supreme Court. After the Ohio Supreme Court denied Frazier relief, he petitioned the United States Supreme Court for a writ of certiorari. Frazier remained free on bond during the pendency of these proceedings. The United States Supreme Court declined to hear Frazier's case on October 1, 1990. Dates for the blood test and the trial were then set by the state criminal court.

Throughout 1989 and 1990, Skiba was terrified of Frazier. She was visibly disturbed any time that she was in his presence. Skiba confided in one friend her fear that Frazier was going to kill her. She moved into her grandparents' home and started sleeping with a knife under her pillow.

Skiba's grandfather, Robert Skiba, followed his usual practice on November 8, 1990 when, at 5:00 a.m., he drove his wife to work at a nearby hospital and returned home fifteen minutes later. Upon his arrival home, his dog was barking and looking excitedly at the back door. Robert Skiba apparently thought little of this unusual behavior at the time. After calling upstairs for his granddaughter at 10:00 a.m. and receiving no response, however, he went upstairs to check on her. Upon entering Tiffany Skiba"s bedroom to rouse her, Robert Skiba was met with the ghastly sight of his granddaughter's corpse lying in bed, covered in blood and full of puncture wounds.

Police officers who arrived at the scene discovered a broken steak knife next to Skiba's body. The knife was part of a set belonging to her grandparents. There was blood on the knife, in the surrounding area, on the stairway heading down from the second-floor bedroom, and on the first-floor living room's door frame. The police discovered that the screen on a basement window had been removed and that one of the panes of glass had been shattered. Although it was normally kept closed, the door leading from the basement into the rest of the house was open. One of Skiba's uncles had once shown Frazier how to gain access to the house through the basement window when they had been accidentally locked out. The neighboring yard contained footprints that pointed away from the Skiba residence. A study of the footprints revealed that they were made by someone wearing size nine or ten boots in a style sold exclusively by K-Mart.

Also on the morning of November 8, 1990, Frazier visited a medical clinic to get treatment for a one-inch cut on his wrist. The cut was consistent with a stab wound. That night, Frazier drove to the home of his friends, the Shamons, in a car that he had rented at the airport two days earlier. The police arrested him at the Shamons' home on November 12,

1990. At the time of his arrest, Frazier had with him a letter from the United States Supreme Court informing him that his petition for certiorari had been denied. In Frazier's apartment the police discovered a receipt from K-Mart for a size-nine boot of the same style found imprinted in the neighboring yard near the Skiba residence.

Frazier was taken to the Medina County jail. He was transported the next day from the jail to a clinic, where the long-ordered paternity test was administered. The test confirmed that Frazier had fathered Skiba's son.

On November 14, 1990, Frazier telephoned Officer James Svekric from the jail. Frazier had known Svekric for many years, and Svekric was one of the police detectives who had transported Frazier the previous day. Frazier asked Svekric to bring him Frazier's telephone book and prescription medication. Svekric, accompanied by another police officer, visited Frazier that day. According to Svekric, Frazier waived his right not to incriminate himself and asked the officers "what [they] could do for him, if [they] could get him a definite sentence in Cleveland as to a flat time, how much time he was going to do if he was to plead guilty." The police officers told Frazier that although they could tell the prosecutor and the judge that Frazier had cooperated, they had no authority to negotiate a plea agreement. Frazier then returned to his cell.

A short time later, however, the police officers conducted a second interview with Frazier, this time in the presence of the local prosecutor, Tim McGinty, who had been waiting in an adjacent building. McGinty informed Frazier that he was about to bring the matter of Skiba's death before a grand jury and that he intended to have Frazier indicted for murder. Frazier offered to provide information about other crimes in exchange for an agreement to allow him to plead guilty. McGinty replied, however, that in order to establish his

credibility, Frazier would need to provide the details of Skiba's murder. Frazier was then asked whether he intended to kill Skiba when he went to her grandparents' home on November 8, 1990. In Svekric's recounting, "he shook his head no, but he did not give us a verbal answer or explain what his intent was that morning." Svekric related the remainder of the interview as follows:

> And I asked him a question, "Do you want to tell us exactly what happened on November 8th with Tiffany Skiba, yes or no," and his answer was, "Yes, I will tell you everything you want to know." But at that time he also stated that he thinks his attorney should be present . . . .

Frazier's jailhouse interview was then terminated.

B. Procedural background

The Cuyahoga County grand jury returned a three-count indictment against Frazier. Count One charged him with the murder of Skiba. The first count contained three death-penalty specifications—for felony murder, the murder of a witness, and murder to escape accounting for another crime. Count Two charged Frazier with the murder of Skiba during the commission of a burglary. It also contained the three identical death-penalty specifications enumerated in Count One. The third count charged Frazier with burglary.

On August 21, 1991, the jury convicted Frazier on all counts. The next phase of the trial concerned the appropriate penalty, at the conclusion of which the jury recommended that Frazier be sentenced to death. On August 29, 1991, the trial court adopted that recommendation.

Frazier appealed his conviction and sentence without success through the Ohio state courts, both on direct appeal and through a petition for postconviction relief. He then initiated federal proceedings for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in September of 1998. The district court denied his petition, but granted him a certificate of appealability on all issues. This timely appeal followed.

II. ANALYSIS

A. Standard of review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), applies to Frazier's case because he filed his habeas corpus petition after the Act's effective date. *Lindh v. Murphy*, 521 U.S. 320, 336, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). A federal court is authorized to grant a writ of habeas corpus to a person in custody pursuant to a state-court judgment, but only if the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). All of Frazier's claims are governed by § 2254(d)(1).

A federal court may grant a writ of habeas corpus under § 2254(d)(1)'s "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of

materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). Section 2254(d)(1)'s "unreasonable application" clause provides two additional bases for habeas relief. *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001), *cert. denied*, 535 U.S. 975, 152 L. Ed. 2d 390, 122 S. Ct. 1448 (2002). The first avenue of relief occurs if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts . . . ." *Williams*, 529 U.S. at 413. Second, relief is available under this provision if the state-court decision "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context." *Campbell*, 260 F.3d at 539.

The Supreme Court has declared that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. In its elaboration on the meaning of the term "objectively unreasonable," the Court stated that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

In the present case, the district court applied the standards set forth under AEDPA and determined that Frazier was not entitled to habeas relief. We review de novo the district court's denial of Frazier's petition. *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002).

B. Certificate of appealability

Before reaching the merits of Frazier's claims, we address a procedural problem that has hindered our

consideration of this appeal. The district court in this case granted a certificate of appealability on all issues, with the following explanation:

> Until such time as such precedent is submitted to me, and, is shown to be applicable to a case at hand, I expect that I shall, as I did in this case, grant certificates of appealability in capital habeas cases as a matter of routine.
>
> Others may view this as an abdication of responsibility; it is, rather, a manifestation of the possibility of my own fallibility, and concern that I may have erred. I do not believe that I have erred—but doubt that I have,-no matter how strongly felt, is not certainty that I have not.

This rationale is contrary to our decision in *Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001), which was also a capital-murder case. Like here, Porterfield had been granted a certificate of appealability on all issues. We noted in *Porterfield* that such a blanket grant conformed to neither the commands of 28 U.S.C. § 2253(c) (providing in part that a "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right . . . [and] shall indicate which specific issue or issues satisfy the showing required"), nor the Supreme Court's construction of the statute in *Slack v. McDaniel*, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) (holding that the requirements of § 2253(c) applied regardless of whether the district court rejected a constitutional claim on the merits or on procedural grounds). Because a blanket grant "undermines the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability," and "because the district court [was]

already deeply familiar with the claims raised by petitioner," we vacated the certificate of appealability in *Porterfield* and remanded the matter "in order to permit the court to engage in the reasoned assessment of each . . . claim as required by *Slack*." 258 F.3d at 487.

The language of § 2253(c) is mandatory. It was therefore error for the district court to issue a blanket certificate of appealability without any analysis. We recognize, however, that the district court rendered its decision before our opinion in *Porterfield*. In contrast to *Porterfield*, moreover, both parties in the present case have already briefed the merits of Frazier's claims, so that vacating the certificate of appealability would "further delay an already lengthy process." 285 F.3d at 485. For these reasons, we will excuse the procedural error of the district court. This is an appropriate time, however, to reiterate both that a certificate of appealability may issue "*only* if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2) (emphasis added), and that any such certificate "*shall* indicate which specific issue or issues satisfy the showing required," *id.* § 2253(c)(3) (emphasis added).

To focus our consideration of the issues in the face of this blanket certificate of appealability, we asked counsel for Frazier at oral argument which claims he perceived to be his strongest. He replied that his primary claims for habeas relief were those premised upon the due process right to a fundamentally fair trial and those based upon the ineffective assistance of counsel. We agree, particularly in light of the fact that the district court singled out "the remarkable and unnecessary misconduct of the prosecutor" as a concern regarding the petitioner's right to a fair trial. Accordingly, we devote our attention to these two issues first.

C. The right to a fundamentally fair trial

Frazier alleges that he was denied his due process right to a fair trial, both because certain evidence was improperly admitted and because of prosecutorial misconduct. "Cases in [the Supreme] Court have long proceeded on the premise that the *Due Process Clause* guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas,* 385 U.S. 554, 563-64, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967).

1. Due process and evidentiary matters

Frazier's first contention is that the trial court improperly admitted (1) cumulative, gruesome photograhs of Skiba's corpse, (2) evidence that Skiba was terrified of Frazier, and (3) evidence that Frazier raped Skiba. To the extent that this is a challenge to the technical correctness of these evidentiary rulings, we lack authority to consider the challenge. *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001) ("A state court evidentiary ruling will be reviewed by a federal *habeas* court only if it were so fundamentally unfair as to violate the petitioner's due process rights."). Rather, Frazier must demonstrate that the state court's conclusion--that the admission of the challenged evidence did not violate his due process rights--was unreasonable, as those rights have been articulated by the Supreme Court.

Frazier argues that the admission into evidence of multiple photographs of Skiba's corpse was excessive. He notes that the Supreme Court has stated: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the *Fourteenth Amendment* provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991).

The Ohio Supreme Court directly addressed this evidentiary issue, concluding that the multiple photographs "were introduced during the coroner's testimony to illustrate the testimony," that "each photograph presents a different perspective of the victim," and that the photographs "were used to illustrate" the nature of the encounter that immediately preceded Skiba's death. *State v. Frazier*, 73 Ohio St. 3d 323, 1995 Ohio 235, 652 N.E.2d 1000, 1010 (Ohio 1995). It ultimately determined that the photographs' "probative value substantially outweighed the danger of unfair prejudice" to Frazier. *Id.* We conclude that the Ohio Supreme Court's resolution of Frazier's federal constitutional claim concerning the admission of multiple photographs of Skiba's corpse was not an unreasonable application of federal law as articulated by the Supreme Court. *See Willingham v. Mullin*, 296 F.3d 917, 928-29 (10th Cir. 2002) (refusing to grant relief on a habeas petitioner's claim that the admission of 22 photos of the victim's body was so unduly prejudicial as to render his trial fundamentally unfair, where the state court provided a reasonable basis for concluding that the photographs' relevance outweighed the danger of unfair prejudice).

Frazier next contends that the admission of evidence that Skiba feared him rendered his trial fundamentally unfair. In the opinion of the Ohio Supreme Court, such evidence was admissible as a present-state-of-mind exception to the hearsay rule. *Frazier*, 652 N.E.2d at 1013. The district court concluded that evidence of Skiba's fear "supported the substantial evidence of [Frazier's] likely motive." Although we find that the relationship between Skiba's fear and Frazier's motive is tangential at best, we recognize the existence of a logical argument that the relevance of such evidence outweighed its potential prejudice. We are unaware, moreover, of any Supreme Court precedent that establishes that the admission of evidence that a murder victim feared the defendant violates the defendant's due process rights.

Frazier's assertion that "several states have held unambiguously that the state of mind of a murder victim is irrelevant to the issue of the identity of the perpetrator" has no bearing on our task under AEDPA. We therefore conclude that the state courts' resolution of this matter was not an unreasonable application of federal law.

The third category of evidence challenged by Frazier concerns his alleged rape of Skiba and paternity of her child. He claims that the admission of the evidence without a limiting instruction rendered his trial fundamentally unfair. Before reaching the merits of this claim, we must first consider the state's argument that this challenge was rejected by the state courts on the basis of state procedural rules.

A federal court is generally barred from considering an issue of federal law arising from the judgment of a state court if the state judgment "rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the [state] court"s decision." *Harris v. Reed*, 489 U.S. 255, 260, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). The adequate-and-independent-state-ground doctrine has been applied in refusing to address the merits of a federal claim because of violations of state procedural rules, such as the failure to make a timely objection at trial. *Id.* at 261. An adequate and independent finding of procedural default will preclude habeas corpus relief "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991).

In determining whether a procedural default has occurred and, if so, what effect the default will have on federal review of a state conviction, the district court must consider whether (1) a state procedural rule exists that applies to the

petitioner's claim, (2) the petitioner failed to comply with the rule, (3) the state court actually applied the state rule in rejecting the petitioner's claim, and (4) the state procedural rule is an adequate and independent ground upon which the state can rely to deny relief. *Reynolds v. Berry*, 146 F.3d 345, 347 (6th Cir. 1998). The rule precluding federal habeas corpus review of claims rejected by the state courts on state procedural grounds applies only in cases where the rule relied upon by the state courts involves a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 423-24, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991). Furthermore, a procedural default does not bar consideration of a federal claim on habeas corpus review unless the last state court rendering a reasoned opinion in the case "clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263 (internal quotation marks omitted).

In this case, the Ohio Supreme Court noted that Frazier failed to object at trial to the omission of a limiting instruction. It therefore analyzed his entitlement to the inclusion of such a jury instruction using the "plain-error" standard. But the larger issue was whether "the trial court erred by admitting evidence of other crimes committed by [Frazier]." *Frazier*, 652 N.E.2d at 1013. The Ohio Supreme Court analyzed the claim on its merits, ultimately finding Frazier's argument to be "without merit." *Id.* at 1013, 1014. We therefore conclude that Frazier is not procedurally barred from presenting the claim that the admission of evidence about his rape of Skiba and the paternity of her child rendered his trial fundamentally unfair.

Turning to the merits of the claim, we agree with the Ohio Supreme Court that the evidence was directly relevant to Frazier's motive and to the death-penalty specifications. The United States Supreme Court decision upon which Frazier relies in pressing this claim held that the introduction

of evidence of prior crimes, where relevant to prove death-penalty specifications, is *not* unconstitutional. *Spencer v. Texas*, 385 U.S. 554, 568-69, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967). We therefore conclude that the admission of evidence that Frazier raped Skiba and fathered her child, even without a limiting instruction, was not an unreasonable application of Supreme Court precedent and did not deprive Frazier of his due process rights.

2. Due process and prosecutorial misconduct

Frazier's next contention is that prosecutorial misconduct deprived him of his right to a fair trial. Frazier identifies eight examples of what he characterizes as prosecutorial misconduct. Some of the conduct that he challenges took place during the guilt phase of his trial, while other instances occurred during the penalty phase. Our conclusion in Part II.D. below that Frazier must be given a new sentencing hearing makes it unnecessary for us to consider the alleged prosecutorial misconduct that occurred during the penalty phase.

None of the alleged prosecutorial misconduct in the guilt phase of the trial impinged upon a particular provision in the *Bill of Rights*. The relevant question, therefore, is whether the prosecutorial conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). To decide this question, we first determine whether the conduct about which Frazier complains was indeed improper. *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). A four-factor test is then applicable to any conduct that we find inappropriate: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether

the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *Id.*

Frazier takes issue with the following instances of the prosecutor's conduct during the guilt phase of the trial: (1) using a photograph of Skiba taken before her murder in his closing argument, (2) relying on Skiba's fear of Frazier as part of the state's case-in-chief, (3) referring to Skiba's character during his closing and rebuttal argument, and (4) placing an empty chair before the jury during his closing argument to "represent" Skiba. The first instance, the use of a photograph of Skiba during closing argument, has been found by some courts to be within the bounds of acceptable conduct. *Nefstad v. Baldwin*, 1995 U.S. App. LEXIS 25875, No. 94-35714, 1995 WL 520050, at *2-*3 (9th Cir. Sept. 1, 1995) (finding no error by the trial court in permitting a "closing argument [wherein] the prosecutor asked the jury to compare a photograph of the victim before the murder with an autopsy photograph of the victim"); *Lowe v. Abrahamson*, 1995 U.S. App. LEXIS 8142, No. 92-2020, 1995 WL 150585, at *1-*2 (7th Cir. Apr. 6, 1995) (order) (finding "nothing improper" about "the presentation at trial of a photograph of the murdered victim wearing a hat from his son's Little League baseball team"). Other courts have found such photographs of the victim improper. *Cargle v. Mullin*, 317 F.3d 1196, 1223-24 (10th Cir. 2003) (agreeing with the state court's determination that the trial court erred in admitting "a number of photographs of the victims while they were alive" because the photographs were "irrelevant and prejudicial"). The state courts in this case determined that the prosecutor's use of Skiba's photograph during closing argument was not improper. In light of the split of authority about the propriety of such conduct, we cannot say that the state courts' determination was unreasonable.

The second instance of alleged prosecutorial misconduct concerns the state's reliance on Skiba's fear of Frazier as part

of its proof. As noted above in Part II.C.1., the state courts ruled that such evidence was relevant and admissible. There is nothing improper about a prosecutor's reliance on a state court's evidentiary ruling, whether or not the ruling itself was correct.

The third instance concerns the prosecutor's references to Skiba's character during his closing and rebuttal argument in the guilt phase of the trial. These references had no relevance to any matter in issue and were therefore improper. The Ohio Supreme Court reached the same conclusion. *Frazier*, 652 N.E.2d at 1015 (commenting that "the prosecutor's remarks were intemperate"). This leads us to the application of the *Carter* factors. In this instance, the prosecutor's remarks were not limited to an isolated instance. On the other hand, they did not form the centerpiece of the prosecutor's argument. But the prosecutor's remarks were plainly deliberate. Furthermore, the state's case was not unusually strong. The evidence was sufficient to prove the defendant guilty beyond a reasonable doubt, but it was not overwhelming. There were no witnesses and no confession (only an ambiguous offer to plead guilty), and the state produced no blood-type or DNA evidence.

Whether the references to Skiba's character tended to mislead the jury or prejudice the defendant is more difficult to determine. Although the prosecutor's remarks did not misstate the evidence, they were in a sense misleading concerning the law. The prosecutor's explicit juxtaposition of the defendant's constitutional rights (like the presumption of innocence) with the "rights" of the decedent (like "the right to go on to college" or "the right to walk down the aisle") suggested to the jury that certain nonexistent rights of the decedent somehow balanced or nullified the constitutional rights of the defendant. On the other hand, although a defense objection to the prosecutor's remarks was overruled, the trial

court correctly instructed the jury on the law, specifically stating: "You must not permit sympathy or bias, prejudice or favoritism for either side to affect your judgments."

A similar analysis applies to the fourth and final alleged incident of prosecutorial misconduct during the guilt phase, the placing of an empty chair before the jury during the prosecutor's closing argument to "represent" Skiba. We again agree with the Ohio Supreme Court's conclusion that this conduct was improper. *Frazier*, 652 N.E.2d at 1015 ("We agree with appellant that the use of the empty chair was excessive.") It was also deliberate. The empty chair, however, was not the focus of the prosecutor's argument, and the state trial court properly instructed the jury not to be influenced by sympathy, bias, or prejudice.

Were we to consider Frazier's claim of prosecutorial misconduct in the first instance, after weighing all of the pertinent factors, the possibility exists that we might be persuaded that he was denied a fundamentally fair trial. But that is not our task. Rather, our inquiry is limited to deciding whether the Ohio Supreme Court's contrary determination was an unreasonable application of clearly established federal law. Because the direction in which the *Carter* factors point is neither obvious nor unambiguous, we conclude that the Ohio Supreme Court's resolution of Frazier's prosecutorial-misconduct claim was not unreasonable. *See Macias v. Makowski*, 291 F.3d 447, 454 (6th Cir. 2002) (holding that, although the court "might have concluded that the prosecutor's comments violated [the petitioner's] due process rights," the state court of appeals's contrary conclusion was not unreasonable, where two factors weighed in favor of the petitioner's claim and two weighed against it).

D. The right to the effective assistance of counsel

Frazier's other major claim is that he was denied his right to the effective assistance of counsel during the penalty phase of the trial, a right guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 684, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Once a defendant has been convicted of a capital offense in Ohio, the jury "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender" and seven other factors, including "whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law." Ohio Rev. Code § 2929.04(B). A sentence of death is appropriate only if the jury is unanimously convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. *Id.* § 2929.03(D)(2).

The jury had already found Frazier guilty beyond a reasonable doubt of the death-penalty-specification charges. Because no mitigation proof was introduced by Frazier at the guilt phase of the trial, he was therefore virtually guaranteed a sentence of death unless he could produce sufficient mitigation evidence at the penalty phase to generate reasonable doubt in the mind of at least one juror about whether the aggravating factors outweighed the mitigating factors. But the sum total of the evidence presented on Frazier's behalf during the penalty phase of the trial was the following unsworn statement: "Ladies and gentlemen, I know you found me guilty, and in the past I have done things that were wrong, but I am not guilty of this crime and I am asking you to spare my life."

The test for establishing constitutionally ineffective assistance of counsel is two-fold. A defendant must first show that the performance of his or her counsel was "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In order to avoid second-guessing trial counsel's strategic decisions, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). The second requirement of an ineffective assistance claim is that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Frazier's ineffective-assistance claim was rejected by the Ohio Court of Appeals on the basis of the first prong of *Strickland*. The court explained: "From the record, it can reasonably be concluded trial counsel were appraised of the purported brain injury from their review of medical records; however, as a matter of trial strategy counsel deemed this avenue of defense unworthy of further pursuit." *State v. Frazier*, 1997 Ohio App. LEXIS 5531, No. 71746, 1997 WL 764810, at *6 (Ohio Ct. App. Dec. 11, 1997).

The "purported brain injury" referred to above is the damage to Frazier's brain that occurred as the result of a 1987 fall from a ladder. Affidavits from postconviction experts on this matter indicate that Frazier suffers from a functional brain impairment. According to one, Frazier has a "significant history for head trauma" to the "frontal lobe" of his brain, which is "the site of impulse control, social judgment and reasoning." Frazier himself has described "a change in decision-making abilities after his head trauma."

These reports also suggest that a correlation could exist between this injury and Frazier's criminal conduct. The state has not challenged the contention that Frazier's trial counsel could have developed this same information had they conducted a reasonable investigation.

We can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any "residual doubt" about his guilt. This failure was not due to counsel's ignorance of Frazier's brain injury. To the contrary, the Ohio Court of Appeals acknowledged that trial counsel were actually aware of Frazier's brain impairment because they saw his medical records, yet counsel failed to investigate the matter or present any evidence regarding the same.

Under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91. This court has commented when evaluating facts similar to those here that "the inadequacy of the attorney's investigation . . . was manifest." *Campbell v. Coyle*, 260 F.3d 531, 553 (6th Cir. 2001) (distinguishing the facts of *Campbell*, where trial counsel had the defendant evaluated by a mental health professional who did not find any mental illness, from those of *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998), where trial counsel had actual notice of the defendant's mental health problems but failed to investigate them). We do not believe that any reasonable attorney who saw the medical records indicating Frazier's brain injury would have declined to investigate the matter. At a bare minimum, a reasonable attorney would have compared the records with the medical literature on brain damage, elicited information from Frazier

himself about the injury and its effects on him, or presented the records on Frazier to someone who could competently evaluate them. To do none of these things after seeing Frazier's medical records was unreasonable.

Our conclusion is bolstered by the Supreme Court's recent decision in the capital case of *Wiggins v. Smith*, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003). Trial counsel in *Wiggins* knew from their client's presentence report that he had lived in "misery as a youth," but they did not investigate his life history any further. *Id.* at 2536. The Maryland Court of Appeals was of the opinion that this performance comported with *Strickland*, but the United States Supreme Court disagreed and held that the state court's contrary conclusion was unreasonable. *Id.* at 2538. In *Wiggins*, as in the present case, "any reasonably competent attorney would have realized that pursuing these leads"--in Wiggins's case, allusions to his horrible childhood; in Frazier's, medical records of his brain injury—"was necessary to making an informed choice among possible defenses .... Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Id.* at 2537.

Furthermore, as both this court and the Ohio Supreme Court have noted, residual doubt is not a mitigating factor under Ohio law. *Coleman v. Mitchell*, 268 F.3d 417, 447 (6th Cir. 2001); *State v. McGuire*, 80 Ohio St. 3d 390, 1997 Ohio 335, 686 N.E.2d 1112, 1123 (Ohio 1997). This court nevertheless concluded in *Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir. 2000), albeit in dicta, that the pursuit of a residual-doubt strategy in that case was reasonable because the defendant's extensive criminal history would have come to light if the jury had heard about his background. *Cf. Abdur'Rahman v. Bell*, 226 F.3d 696, 707-08 (6th Cir. 2000) (concluding that "trial counsel were ineffective in failing to

further investigate the background of the accused," but finding no prejudice where "it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial"). No such concerns could have justified the approach in the present case, however, where the jury had already heard considerable evidence about Frazier's rape of Skiba.

The prosecutor himself aptly summarized the strategy of Frazier's trial counsel during the penalty phase. After quoting Frazier's unsworn denial of guilt, the prosecutor stated: "That's it. Fifteen seconds of mitigation. Now, we heard a moment ago about factors of mitigation that you find. Apparently they don't know." This summary strikes us as accurate to the extent that it reflects the fact that Frazier's counsel failed to offer any evidence during the penalty phase that is recognized under Ohio law as mitigation. Based on the above factors, we conclude that Frazier's trial counsel performed below an objective standard of reasonableness.

The Ohio Court of Appeals, on the other hand, implicitly held that Frazier's trial counsel performed at or above an objective standard of reasonableness when it opined that "as a matter of trial strategy counsel deemed this avenue of defense unworthy of further pursuit." We have concluded the opposite. The question under AEDPA, then, is whether the state court applied the first prong of *Strickland* unreasonably, or only erroneously. *See Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002) (clarifying that the question of whether a state court's application of *Strickland* is unreasonable is conceptually distinct from the underlying question of whether counsel's performance fell short of an objective standard of reasonableness).

Three factors were cited by the Ohio Court of Appeals in support of its conclusion:

> 1) counsel's argument to the trial court that a psychologist would be used merely to interpret the mitigation expert's findings; 2) counsel's filing of the motion requesting a limitation on references to mitigation factors to only those upon which appellant ultimately relied; and 3) the thorough and professional manner in which counsel conducted appellant's defense during both the guilt and the penalty phase of appellant's trial.

Frazier, 1997 Ohio App. LEXIS 5531, [WL] at *6. The first two factors, however, have no relevance in explaining how the strategy ultimately pursued by Frazier's counsel was reasonable. Although the third factor is relevant in determining whether the trial strategy was reasonable, it is largely conclusory and again provides no theory upon which trial counsel's "strategy" could have been based. We do not believe that it is reasonable to infer that a trial strategy, which is on its face irrational and for which no justification has ever been produced, becomes reasonable simply because of "the thorough and professional manner" in which trial counsel otherwise performed.

We note, moreover, that the theory of Frazier's defense during the guilt phase of his trial was that Frazier did not commit the murder. He presented no insanity or diminished capacity defense. The jury therefore did not hear any evidence about Frazier's brain injury during the guilt phase of the trial. Indeed, it heard no evidence whatsoever during the guilt phase of the trial that could bear on the issue of mitigation. As the prosecutor accurately commented at the opening of the penalty phase: "The State's job is over. The proof of the aggravating circumstances here is monumental, unrebutted, and it is no mere allegation any longer. It is fact,

since the conclusion of this case. There has been absolutely zero, zilch, nil evidence of mitigation." This being the situation, it appears to us that competent trial counsel for Frazier would have realized that their client had everything to gain and nothing to lose by introducing evidence of his brain injury at the penalty phase of the case. Yet they sat on their hands.

The instant case, therefore, is easily distinguishable from the ruling in *Bell,* where the defendant's trial counsel also introduced no evidence during the penalty phase of the trial. 122 S. Ct. at 1848. The state court concluded that this trial strategy passed muster under *Strickland*, and the Supreme Court held that the state court's conclusion was not unreasonable. *Id.* at 1853-54. Crucial to this determination, however, was the fact that the defendant had already introduced his best mitigation evidence during the guilt phase of the trial:

> Because the defense's theory at the guilt phase was not guilty by reason of insanity, counsel was able to put before the jury extensive testimony about what he believed to be the most compelling mitigating evidence in the case--evidence regarding the change his client underwent after serving in Vietnam; his drug dependency, which apparently drove him to commit the robbery in the first place; and its effects. . . . Defense counsel advised the jury that the testimony of the experts established the existence of mitigating circumstances, and the trial court specifically instructed the jury that evidence of a mental disease or defect insufficient to establish a criminal defense could be considered in mitigation.

Id. Frazier's counsel, in contrast, introduced absolutely no mitigating evidence during the guilt phase of the trial.

In sum, no reason at all has been adduced to justify the failure of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. The state court did not articulate one. Nor can we fathom one. Absent any reason to explain or justify such a trial strategy, we conclude that the state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable. *See Wiggins*, 123 S. Ct. at 2538 (rejecting as unreasonable a state court's determination that trial counsel performed adequately where, although no trial strategy could be articulated to justify counsel's unreasonable failure to investigate and present evidence of their client's terrible childhood, the state court "merely assumed that the investigation was adequate").

Habeas relief is thus warranted if Frazier can show that there is a reasonable probability that, but for his counsel's deficient performance, the result of the penalty phase would have been different. *See id.* at *16 ("In order for counsel's performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. . . . Our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."). To make this showing, Frazier must direct us to mitigating evidence that could have been presented and that is sufficient to undermine our confidence in the outcome of the penalty phase. *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Furthermore, AEDPA requires Frazier to have developed the factual bases for his claims during postconviction proceedings in state court. *Alley v. Bell*, 307 F.3d 380, 386 (6th Cir. 2002) ("These rules apply both to entirely new legal claims and new factual bases for relief; for a claim to be considered exhausted, the habeas

petitioner must have fairly presented to the state courts the substance of his federal habeas claim.") (internal quotation marks omitted).

We agree with the state that Frazier failed to develop any facts concerning his general history, character, and background in the state postconviction proceedings. Accordingly, we cannot consider the facts that Frazier was abandoned as a child or that he has an abnormal response to stress. The state concedes, however, that Frazier presented evidence concerning his brain injury to the state courts during the postconviction proceedings. Although information about the nature and severity of the injury was less thoroughly developed in those proceedings than it is now, sufficient facts were presented to indicate the existence of evidence concerning Frazier's brain injury that could have been developed and presented to the jury during the penalty phase.

We must therefore examine whether the existence of this evidence is sufficient to undermine our confidence in the result of the penalty-phase proceeding. Frazier's trial counsel presented only his unsworn denial of guilt, which does not amount to mitigating circumstances under Ohio law. This virtually assured him a sentence of death. Had trial counsel's performance not been deficient, the jury could have heard evidence of Frazier's fall from a ladder and associated brain injury, which could have correlated with his criminal conduct. Such evidence would have constituted mitigating circumstances under Ohio law. Ohio Rev. Code § 2929.04(B).

In concluding that Frazier had not shown prejudice, the district court observed in a footnote "that the evidence of record, in addition to enabling the jury to find the petitioner guilty beyond a reasonable doubt, shows that he acted with deliberation and forethought . . . . These acts do not manifest

impulsive or uncontrolled behavior." This analysis, however, does not account for the probability that the jury would find that a murderer who suffers from a functional brain impairment is less morally culpable than one who does not, even if the brain impairment did not "cause" Frazier to murder Skiba.

Indeed, we think that the circumstances of the crime were amenable to such mitigating evidence. Competent trial counsel could have pointed out, for example, that the blood-stained, broken knife found beside Skiba's corpse came from her grandparents' silverware, and that Skiba had been sleeping with a knife under her pillow. Furthermore, during the jailhouse questioning of Frazier on November 14, 1990, the police officers and prosecutor did not ask Frazier whether he murdered Skiba. They asked, instead, whether he intended to kill her when he went to her grandparents' home on the morning of the murder. Frazier shook his head no in response to that question. Trial counsel could thus have depicted a scenario in which Frazier went unarmed to Skiba's grandparents' home to confront or threaten her, not to kill. But when he encountered the knife-wielding Skiba, Frazier succumbed to the stress of the moment, grabbed the knife from her hands, and wildly stabbed Skiba far more times than would have been necessary to kill her.

Such a scenario fits the facts of the crime and is made plausible by the existence of a functional brain impairment, which, although it might not have turned Frazier into a cold and calculating murderer, could have impaired his ability to deal with stressful or emotional situations, even ones of his own making. This is but one example of how competent trial counsel might have utilized the evidence of Frazier's functional brain impairment to generate reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances in the present case. We are by no means suggesting that the presentation of such evidence and

argument would have assured Frazier the avoidance of the death penalty, but we are saying that this outcome is within the realm of reasonable probability as defined in *Strickland.* 466 U.S. at 694.

As the Supreme Court observed in *Williams v. Taylor*, 529 U.S. 362, 398, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000): "Mitigating evidence unrelated to dangerousness may alter the jury"s selection of penalty, even if it does not undermine . . . the prosecution's death-eligibility case." In *Williams*, the Court recognized that "the reality that [the defendant] was 'borderline mentally retarded[ ]' might well have influenced the jury's appraisal of his moral culpability." *Id.* We conclude that the same is true here. Had the jurors been confronted with the mitigating evidence of Frazier's brain injury, the probability that at least one juror would not have decided that the aggravating circumstances of the case outweighed the mitigating circumstances beyond a reasonable doubt "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Wiggins v. Smith*, 156 L. Ed. 2d 471, 123 S. Ct. 2527, 2543 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); Ohio Rev. Code § 2929.03(D)(2) (requiring jury unanimity for the imposition of a death sentence). We therefore hold that Frazier has established that his right to the effective assistance of counsel was violated at the penalty phase of his trial, and that the state court's conclusion to the contrary is an unreasonable application of clearly established Supreme Court precedent.

The dissent does not quibble with the foregoing analysis on the merits. It contends instead that "Frazier's claim of ineffective assistance of counsel is procedurally defaulted and this court consequently has no business considering the merits of that claim." (Dissenting Op. at 34) According to the

dissent, the Ohio Court of Appeals never reached the merits because it held that the claim was barred by the state-law doctrine of res judicata. (*Id.*)

This will surely come as a surprise to the state, which (1) conceded in its brief that "Frazier did present his 'brain damage' claim to the state courts," and (2) then proceeded to argue that "the Ohio court's finding that trial counsel acted competently in this regard is not an unreasonable application of *Strickland*." We therefore believe that the dissent mischaracterizes the state's argument by asserting that the state raised a procedural-default defense to every instance of ineffective assistance alleged by Frazier. Instead, the state made clear its position that Frazier had forfeited any ineffective-assistance claim premised upon his abandonment as a child or his abnormal response to stress, and that his preservation of the claim based upon his brain damage did not permit him to revive his other instances of ineffective assistance.

As the above-quoted language demonstrates, however, the state did not contend that Frazier procedurally defaulted his ineffective-assistance claim based upon his counsel's failure to investigate and present evidence of his brain damage. The state's failure to raise the issue of procedural default with respect to this instance of ineffective assistance is itself sufficient to dispense with our consideration of the question. "A court of appeals is not 'required' to raise the issue of procedural default *sua sponte*." *Trest v. Cain*, 522 U.S. 87, 89, 139 L. Ed. 2d 444, 118 S. Ct. 478 (1997).

Even if the state had not waived its procedural-default defense, moreover, we do not believe that the defense would be applicable in this case. "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a

state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989) (internal quotation marks omitted). Contrary to the dissent's interpretation of the discussion by the Ohio Court of Appeals, we find no clear and express statement in the opinion that the state procedural doctrine of res judicata was the basis for the decision.

The Ohio Court of Appeals concluded its analysis of Frazier's ineffective-assistance claim as follows:

> In view of the fact that appellant had the assistance of at least three experienced attorneys during all phases of the trial proceedings, and mindful that a reviewing court will not second-guess what are essentially matters of trial strategy, neither the record nor appellant's evidence provided *dehors* the record supported his claim.

Frazier, 1997 Ohio App. LEXIS 5531, [WL] at *6. We do not believe that the above statement can be fairly characterized as a determination that Frazier had attempted to present evidence that should have been presented on direct appeal. Rather, the Ohio court's conclusion goes to the merits of Frazier's claim.

Disposing of Frazier's ineffective-assistance claim on the merits was also sensible as a matter of state law. The Ohio Supreme Court has held that "where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief." *State v. Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169, 170 (Ohio 1982) (syllabus). According to the dissent, the Ohio Court of Appeals decided that Frazier's claim was barred by res judicata after concluding that the evidence provided by his

postconviction experts was not new because trial counsel had been "appraised of the purported brain injury." (Dissenting Op. at 36 (quoting *Frazier*, 1997 Ohio App. LEXIS 5531, [WL] at *6)) Such a decision, however, would have been a mistaken application of *Cole*, because, as our own analysis of Frazier's claim demonstrates, the simple fact that trial counsel "had been appraised of the purported brain injury" does not in and of itself establish ineffective assistance of counsel. We thus conclude that the dissent's reading of the decision by the Ohio Court of Appeals is plausible, but that it is neither the only nor the best interpretation.

The Ohio Court of Appeals's decision also contains no express statement that its conclusion on the merits of Frazier's ineffective-assistance claim is an alternative holding. This contrasts with that court's disposition of another argument raised by Frazier concerning "the trial court's failure to grant appellant's motion for a psychological expert in mitigation," as to which the appellate court specifically stated that "the trial court properly applied the doctrine of *res judicata*." *Frazier*, 1997 Ohio App. LEXIS 5531, [WL] at *6.

In sum, the state did not raise the issue of procedural default with respect to the "brain damage" claim by Frazier upon which we grant relief. Alternatively, we do not believe that the Ohio Court of Appeals clearly and expressly rested its decision regarding this claim on an independent state procedural ground. We are therefore unpersuaded by the thoughtful argument of the dissent.

E. Remaining claims

Frazier advances sixteen other claims on appeal that merit substantially less discussion. Having concluded that the penalty phase of Frazier's trial was constitutionally defective, we have no need to consider any other arguments concerning

that portion of the trial. We therefore will not address Frazier's claim that he was entitled to the appointment of an independent psychological expert for the penalty phase, or his claim that the trial court's instruction to the jury at the penalty phase was unconstitutional.

Of the remaining fourteen claims, the only one that deserves further discussion by this court is Frazier's argument that his rights under the *Ex Post Facto Clause*, U.S. Const. art. I, § 9, cl. 3, were violated. As detailed in Part I.A. above, Frazier, while in jail and without a lawyer, requested and received a meeting with two police officers and Prosecutor McGinty on November 14, 1990. Frazier essentially offered to plead guilty to the rape and murder of Skiba in exchange for a definite prison term. That offer played prominently in the state's presentation of its case. Frazier argues that the admission of evidence concerning his offer was made possible only by a change in the Ohio rules of evidence that occurred after the offense but prior to trial, resulting in a violation of the *Ex Post Facto Clause*.

In November of 1990, when Skiba was murdered, Rule 410 of the Ohio Rules of Evidence provided that evidence of "an offer to plead guilty or no contest to the crime charged or to any other crime, or statements made in connection with, and relevant to, any of the foregoing . . . offers, is not admissible in any . . . criminal proceeding against the person who made the offer." Rule 410 was revised in July of 1991. The revised version, in effect during Frazier's trial, prohibited the introduction of evidence concerning "any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn." Ohio R. Evid. 410(A)(5).

Every court to have considered Frazier"s *ex post facto* claim has resolved it by concluding that, because the police officers and the prosecutor told Frazier that they could not negotiate a plea bargain at that time, no plea discussions took place on November 14, 1990. We find this analysis problematic. Although current Rule 410 requires the occurrence of plea discussions in order to activate the prohibition, former Rule 410 does not. The former rule instead references only "an offer to plead guilty." Thus, were we in a position to decide this question of state law in the first instance, it would seem to us that Frazier's offer to plead guilty was admissible under current Rule 410, but not under former Rule 410. Of course, it is the contrary judgment of the Ohio Supreme Court that counts in construing the Ohio Rules of Evidence. *See Frazier*, 652 N.E.2d at 1012 ("We concur with the lower courts in their determination that the interview that occurred on November 14, 1990 was simply not a plea discussion. We would reach the same result regardless of which version of Evid. R. 410 we applied.") (emphasis omitted).

We add, moreover, that the *Ex Post Facto Clause* is not implicated by the change to Rule 410. Frazier argues that the Clause is violated by "every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798) (opinion of Chase, J.). But the change to Rule 410 did not alter the quantum of evidence necessary to convict Frazier. Rather, it expanded the range of admissible testimony. The Supreme Court explained the difference over a century ago:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they

> do not . . . alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

Hopt v. Utah, 110 U.S. 574, 589, 28 L. Ed. 262, 4 S. Ct. 202 (1884); *see also Carmell v. Texas*, 529 U.S. 513, 542-47, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000) (explaining the distinction). In addition to falling short under AEDPA, therefore, Frazier's *ex post facto* claim fails on the merits.

The district court disposed of Frazier's thirteen remaining claims in a careful and detailed manner. These claims range from the contention that Ohio's statutory scheme of capital punishment is unconstitutional to the argument that the instruction on reasonable doubt given by the trial court was constitutionally deficient. Our discussion of these other claims would be duplicative and serve no useful purpose. We therefore adopt the reasoning of the district court as to all of these remaining claims and find them without merit.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** in part the judgment of the district court, **GRANT** Frazier a conditional writ of habeas corpus that will result in the vacation of his death sentence unless the state of Ohio commences a new penalty-phase trial against him within 180 days from the date that the judgment in this matter becomes final, and **REMAND** the case for further proceedings consistent herewith.

DISSENT BY: ALICE M. BATCHELDER (In Part)

DISSENT

CONCURRING IN PART, DISSENTING IN PART

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. The majority entertains the question of whether Frazier received the effective assistance of counsel at the mitigation stage of his trial, despite the fact that the Ohio courts never reached that question because, they held, Frazier's claim was barred by the state law doctrine of *res judicata*. Because Frazier's claim of ineffective assistance of counsel is procedurally defaulted and this court consequently has no business considering the merits of that claim, I respectfully dissent from the majority's holding in Part II.D of its opinion. To the extent that the claims addressed in Parts II.C and II.E are not waived or procedurally defaulted, I concur in the majority's treatment of those claims, *see* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"), as I do in the remainder of its opinion.

I

Before addressing the legal arguments the majority makes in Part II.D, it is important to understand the treatment of Frazier's ineffective assistance of counsel claim by the Ohio courts. After his conviction and sentencing in state trial court, Frazier appealed to the Ohio Court of Appeals, where he raised fourteen assignments of error. In none of those assignments did Frazier mention the issue of the effectiveness of his trial counsel, despite the fact that

Frazier's attorneys on appeal were not the same lawyers that represented him at trial. n1 On appeal by right to the Ohio Supreme Court, Frazier once again failed to raise his claim of ineffective assistance of counsel.

> n1 Frazier did challenge the constitutionality of several Ohio statutes on the basis that those statutes worked to deprive him of the effective assistance of counsel. However, he did not argue on direct appeal that *his* counsel were ineffective.

After the United States Supreme Court denied Frazier's petition for a writ of certiorari, he brought a petition under Ohio Rev. Code § 2953.21 (1997), n2 to vacate or set aside his sentence in the Cuyahoga County, Ohio, Court of Common Pleas, and asserted for the first time that his trial counsel were ineffective because they failed to investigate and present mitigating evidence at the sentencing phase of his trial. The Court of Common Pleas, without addressing the merits of this claim, stated as follows:

> Consistent with the principles of *res judicata*, matters which have been or should have been raised on direct appeal may not be considered in post-conviction proceedings. *State v. Ishmail* (1981), 67 Ohio St. 2d 16, 423 N.E.2d 1068. In addition, where a defendant, represented by new counsel on direct appeal, fails to raise the issue of competent trial counsel and said issue could fairly have been determined without evidence [beyond] the record, *res judicata* is a proper basis for dismissing the defendant's Petition for Post-Conviction Relief. *State v. Cole* (1982), 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169.

J.A. at 312 (Court of Common Pleas opinion). Because, the court held, Frazier's trial counsel were different from his counsel on direct appeal, "any ineffective assistance of

counsel [claim] concerning trial counsel's performance should have been raised on direct appeal in accordance with *Cole*." *Id.* The court therefore granted the State's motion to dismiss, and denied Frazier's request for an evidentiary hearing.

> n2 Ohio Rev. Code § 2953.21 provides, when a prisoner has filed for post-conviction relief, that "unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues . . . ." § 2953.21(E) (1997). However,
>
> > before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, [and] all the files and records pertaining to the proceedings against the petitioner . . . .
>
> § 2953.21(C).

The Ohio Court of Appeals affirmed. After examining the "new evidence" of his "organic brain impairment" that Frazier claimed was unavailable at trial, n3 the court held that the evidence was not new, and hence did not permit Frazier to overcome the bar of *res judicata*. The court noted that "it can reasonably be concluded trial counsel were appraised of the purported brain injury from their review of the medical records; however, as a matter of trial strategy counsel deemed this avenue of defense unworthy of further pursuit." n4 *State v. Frazier*, 1997 Ohio App. LEXIS 5531, No. 71746, 1997 WL 764810, at *6 (Ohio Ct. App. Dec. 11, 1997). This conclusion, the court said, was "reubfirced" by

three factors, namely, (1) counsel's argument that a psychologist would merely interpret the findings of the mitigation expert; (2) counsel's filing of a motion to limit reference to mitigating factors; and (3) "the thorough and professional manner in which counsel conducted appellant's defense . . . ." n5 *Id.* These statements by the Ohio Court of Appeals were not made in the context of discussing the merits of Frazier's claim of ineffective assistance of trial counsel, but in the context of determining whether that ineffective assistance claim was barred by the state law doctrine of *res judicata.* The Common Pleas Court, without reaching the merits of that claim, had granted the state's motion to dismiss Frazier's post-conviction petition, holding that the claim was barred by *res judicata.* The Court of Appeals affirmed that judgment, mentioning the merits only to the extent of explaining their conclusion that the "new" evidence of head injury Frazier urged the court to rely on in order to get around the *res judicata* bar was not new at all.

n3 Ohio law provides that the procedural bar of *res judicata* does not apply in this context if the petitioner sets forth, in support of his newly raised claim, evidence that was not available at trial or on direct appeal, and without which the defense could not have been expected to raise the new claim. *See State v. Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169, 171 (Ohio 1982).

n4 The majority agrees with the Ohio courts' factual finding that Frazier's trial attorneys knew enough about his head injury to present that evidence for mitigation purposes: "Although information about the nature and severity of the injury was less thoroughly developed in those [state postconviction] proceedings than it is now, sufficient facts were presented to indicate the existence of evidence concerning

Frazier's brain injury that could have been developed and presented to the jury during the penalty phase." Supra, at 25.

n5 The majority correctly notes that "the first two factors . . . have no relevance in explaining how the strategy ultimately pursued by Frazier's counsel was reasonable." Supra, at 22. But this statement indicates that the majority misunderstands the legal analysis that the Ohio Court of Appeals undertook. The Ohio Court of Appeals was not seeking to support the "reasonableness" of the trial counsel's investigatory tactics (or lack thereof); rather, the court was explaining the basis for its conclusion that trial counsel was aware of evidence Frazier claimed was not available at trial, a matter to which the first two factors are obviously relevant.

II

Respondent Huffman raises Frazier's "failure to present the [ineffective assistance of counsel] claim and the facts in support of it to the state courts." Huffman Br. at 49-50. Notwithstanding the Supremacy Clause of the Constitution, *see Cooper v. Aaron*, 358 U.S. 1, 3 L. Ed. 2d 5, 18-19, 78 S. Ct. 1401, 79 Ohio Law Abs. 452 (1958), federal habeas courts are not free to undertake a plenary review of all claims brought pursuant to 28 U.S.C. § 2254. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977) ("a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts"). Instead, this court must first consider whether Frazier's ineffective assistance of counsel claim is properly before it prior to discussing the merits of that claim.

This issue "concerns the respect that federal courts owe the States and the States' procedural rules when reviewing

the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). The Supreme Court has held that "where the petitioner . . . failed properly to raise his claim on direct review, the writ [of habeas corpus] is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'" *Reed v. Farley*, 512 U.S. 339, 354, 129 L. Ed. 2d 277, 114 S. Ct. 2291 (1994) (quoting *Wainwright v. Sykes*, 433 U.S. at 84). This rule applies when a state court, relying upon a state rule of law, refused on collateral appeal to consider a claim that the petitioner could have raised on direct review, and the petitioner now raises the same claim on habeas appeal. *Teague v. Lane*, 489 U.S. 288, 297-98, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (holding that petitioner's claim, which he failed to raise on direct review in state court, was procedurally defaulted because the Illinois appeals court refused, on the basis of a state law doctrine of *res judicata*, to consider the claim in a state collateral proceeding); *Coleman v. Mitchell*, 268 F.3d 417, 428-29 (6th Cir. 2001) (Clay, J.) (holding that Ohio's doctrine of "*res judicata* under § 2953.21 [is] an adequate and independent state ground justifying foreclosure of constitutional claims" in habeas proceedings); *see generally Coleman v. Thompson*, 501 U.S. at 729-30 ("The [independent and adequate state ground] doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds.").

This court's initial obligation with regard to Frazier's ineffective assistance of counsel claim, which the Ohio courts held was barred by *res judicata*, is to determine whether the claim is in fact procedurally defaulted. First, we must consider whether Ohio's procedural bar to Frazier's

raising his constitutional claim was "firmly established and regularly followed" at the time the Ohio Court of Appeals ruled. *Ford v. Georgia*, 498 U.S. 411, 424, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991). It clearly was. *State v. Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169 (Ohio 1982), the case on which the Court of Common Pleas relied, and which was subsequently cited by the Ohio Court of Appeals as support for its holding on *res judicata*, is not only itself established, but relies directly upon the 1967 case of *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (Ohio 1967). *State v. Perry* was cited by this court when we held that "application of *res judicata* . . . is an adequate and independent state ground for barring habeas review of constitutional claims." *Coleman v. Mitchell*, 268 F.3d at 429.

Second, we must determine whether the state's procedural rule barring review is an adequate and independent state ground sufficient to foreclose review of constitutional claims. I have already cited authority establishing that Ohio's doctrine of *res judicata* meets this requirement. *See id.; see also Mason v. Mitchell*, 320 F.3d 604, 628 (6th Cir. 2003) (reaffirming *Coleman v. Mitchell's* holding that Ohio's doctrine of *res judicata* is an adequate and independent state ground).

Third, we must be sure that the last state court to rule on Frazier's claim actually disposed of that claim on a state law procedural ground. n6 *Thompson*, 501 U.S. at 734-35 "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989) (internal quotations omitted). So long as the state court does so, its finding of procedural default precludes consideration by a federal court even when the state court also analyzed the defaulted claim under federal law. *Id.* at

264 n.10. In this case, the majority uses as its tenuous springboard to launch into the merits of Frazier's ineffective assistance claim—without ever addressing whether the claim was procedurally defaulted—a patently incorrect characterization of the Ohio Court of Appeals' ruling: "Frazier's ineffective-assistance claim was rejected by the Ohio Court of Appeals on the basis of the first prong of *Strickland*." *Supra*, at 19. In fact, as I discussed above, the Ohio Court of Appeals held that "the trial court properly applied the doctrine of *res judicata*." *Frazier*, 1997 Ohio App. LEXIS 5531, [WL] at *6. That court never mentioned *Strickland* or any other federal court precedents pertaining to ineffective assistance of counsel (with the exception of one—*Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995)—upon which Frazier relied but that contained facts "inapposite" to those of the present case). Even if the Ohio Court of Appeals had analyzed the merits of Frazier's ineffective assistance claim, its distinct holding based upon the state law doctrine of *res judicata* is sufficient to bar our consideration of that claim unless Frazier can show cause and prejudice.

> n6 While the Ohio Supreme Court was actually the last state court to rule on Frazier's collateral appeal, the Court summarily "declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question." J.A. at 345 (Ohio Supreme Court order). This court therefore looks to the Ohio Court of Appeals decision as the final reasoned state court decision for purposes of considering procedural default. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991) (holding that a federal court looks through an unexplained order "to the last reasoned decision," and does not assume that the unexplained order lifts the prior holding that the claim at issue was procedurally barred).

Finally, we must examine whether the Ohio Court of Appeals, which applied the doctrine of *res judicata* and rejected Frazier's contention that his claim was based upon evidence outside the record, actually "discussed any of that evidence, made specific factual findings on the matter, or provided any reasoned analysis" to uphold its decision. *Williams v. Coyle*, 260 F.3d 684, 696 (6th Cir. 2001). "Without such analysis, we are unwilling to rule that the claim is procedurally barred." *Id.* In this case, the Ohio Court of Appeals discussed the "new" evidence put forth by Frazier, including the affidavit of psychologist Sharon L. Pearson, who opined that Frazier should have been examined by a licensed psychologist as part of his mitigation defense. *Frazier*, 1997 Ohio App. LEXIS 5531, [WL] at *6. Moreover, the court explained—in the portion of its opinion that the majority confuses for a *Strickland* analysis—the basis for its conclusion that Frazier's trial counsel were aware of Frazier's head injury and therefore why the evidence *dehors* the record was not sufficient to overcome the procedural bar of *res judicata*. *Id.* The Ohio Court of Appeals' analysis was more than sufficient to comply with the requirements of *Williams v. Coyle*.

Therefore, this court is required to determine whether Frazier can show both cause and prejudice for his failure to comply with Ohio's procedural rule. Clearly, he cannot. Frazier has not shown any cause for his failure to raise on direct appeal his claim of ineffective assistance of counsel. In his brief before this court, he fails to address the issue of procedural default at all, and instead launches directly into a discussion of the merits of his claim. "We . . . require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim." *Edwards v. Carpenter*, 529 U.S. 446, 451, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000). Frazier has not even attempted to make such a demonstration, and any excuse Frazier might now present

for his failure to raise his ineffective assistance claim properly on direct appeal is waived. *See Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) (citing Fed. R. App. P. 28 and noting that the court "normally declines to consider issues not raised in the appellant's opening briefs").

The one means by which Frazier could bypass the requirement that he show cause is extraordinary: "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). The present issue concerns whether Frazier was sentenced fairly, and so "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Sawyer v. Whitley*, 505 U.S. 333, 347, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992). Since Frazier only claims that the alleged ineffective assistance of his counsel resulted in a failure to present available mitigating evidence at the sentencing phase, and since the evidence of his brain impairment does not call into question the jury's finding of aggravating factors, Frazier cannot use the doctrine of "actual innocence of the death penalty" to excuse his procedural default. *Id.* Moreover, since Frazier does not set forth any evidence which, if believed, might lead a trier of fact to find him innocent of the murder of Tiffany Skiba, he cannot meet *Carrier's* actual innocence standard, namely, that the alleged constitutional error probably resulted in the conviction of a defendant who was actually innocent. *Schlup v. Delo*, 513 U.S. 298, 322-27, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995).

III

All means of circumventing the Ohio courts' holding that Frazier's ineffective assistance claim was barred by *res judicata* have been foreclosed; this court therefore has no legal authority to consider the merits of that claim. In so doing, the majority contravenes clearly established precedent of the United States Supreme Court and this Circuit, and "undermines the State's interest in enforcing its laws." *Coleman v. Thompson*, 501 U.S. at 731. I therefore dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3122

Richard M. Frazier,
Petitioner-Appellant,

v.

Stephen J. Huffman, Warden,
Respondent-Appellee.

Filed: October 28, 2003

Before: BATCHELDER, CLAY, and GILMAN, Circuit Judges.

COUNSEL

For Richard M. Fraxier, Petitioner - Appellant: John B. Nalbandian, Taft, Stettinius & Hollister, Cincinnati, OH. Daniel F. Oberklein, Taft, Stettinius & Hollister, Cincinnati, OH. David Paul Bradley, Gallagher, Sharp, Fulton & Norman, Cleveland, OH.
For STEPHEN J. HUFFMAN, Warden, Respondent-Appellee: Michael L. Collyer, Office of the Attorney General of Ohio, Cleveland, OH. Henry G. Appel, Attorney General's Office of Ohio, Columbus, OH.

OPINION BY: RONALD LEE GILMAN

OPINION
SUPPLEMENTAL ORDER

RONALD LEE GILMAN, Circuit Judge. Following the issuance of this court's opinion, found at 343 F.3d 780 (6th Cir. 2003), Richard M. Frazier filed a petition to rehear. His petition is based on the concern that the concluding paragraph of our opinion could be interpreted as foreclosing his right to argue in the state courts of Ohio that § 2929.06 of the Ohio Revised Code, enacted in 1996, is not retroactive to his offense, which occurred in 1990. We recognize that this is still an open question under Ohio law. *State v. Gross*, 97 Ohio St.3d 121, 2002 Ohio 5524, 776 N.E.2d 1061, 1114-16 (Ohio 2002) (Resnick, J., concurring in part and dissenting in part).

> Frazier's right to argue this issue of state law in the Ohio courts is not foreclosed by our opinion. To remove any doubt on this point, however, we amend our opinion by striking the concluding paragraph in its entirety and substituting the following in lieu thereof:

III. CONCLUSION

For all of the reasons set forth above, we REVERSE in part the judgment of the district court, GRANT Frazier a conditional writ of habeas corpus that will result in the vacation of his death sentence unless the state of Ohio commences a new penalty-phase trial against him within 180 days from the date that the judgment in this matter becomes

final, and REMAND the case for further proceedings consistent herewith. If the State does elect to initiate such a proceeding, we presume that the state court will first have to determine whether § 2929.06 of the Ohio Revised Code is retroactive. Only if the state court resolves the issue in the State's favor would the prosecution be free to conduct a new penalty phase proceeding if it chooses to do so.

Judge Batchelder, while continuing to adhere to her dissent in all respects, concurs in this Supplemental Order for the sole purpose of clarifying that Frazier's right to challenge the applicability of § 2929.06 of the Ohio Revised Code to his case is not foreclosed by the majority's opinion.

In light of the foregoing revision, we find no reason to have this case reheard. Frazier's petition to rehear is therefore DENIED.

DISSENT BY: CLAY

DISSENT

CLAY, Circuit Judge, dissenting. I question the propriety of Judges Gilman and Batchelder utilizing the vehicle of a petition for rehearing to provide an advisory legal opinion with respect to an issue that was never raised or briefed by the parties below or on appeal when the parties fully had an opportunity to do so. Such is not the proper use of a petition for rehearing. "A petition for rehearing is intended to bring to the attention of the panel claimed error of fact or law in the opinion." 6 Cir. I.O.P. 40(a). More importantly, Judge Batchelder continues to abide by her previously filed dissenting opinion in this matter. She has not relinquished her dissent, either in full or in part, by joining the majority

opinion and has not concurred even partially in the majority opinion. I therefore do not believe it is proper for Judge Batchelder to vote to grant the petition for rehearing by voting to revise the majority opinion--in which she does not join--by voting for the Supplemental Order. It is my understanding that Judge Batchelder, by her dissent, continues to dispute both the reasoning of the majority opinion and the relief afforded in the form of a new penalty phase trial. Although I have not found any Sixth Circuit authority which directly addresses this situation, it certainly seems contrary to our Court's policies and procedures to think that a judge can participate in redrafting an opinion that she does not join, or participate in determining the relief to be afforded, even on a petition for rehearing, when she rejects the notion that there is any legal basis for the relief requested by the petitioner. In other words, I do not see how a member of the Court can dissent and participate in formulating the relief afforded by an opinion that he or she dissents from. Put another way, there is no legally cognizable majority vote for the Supplemental Order, notwithstanding Judge Gilman's assertions to the contrary. As a result, the Supplemental Order is of no force or effect. Notwithstanding my belief that the Supplemental Order is of no legal import or guidance for the parties or members of the public, out of an abundance of caution, I will proceed to address the substantive points of the Supplemental Order.

Although § 2929.06 of the Ohio Revised Code was enacted in 1996, Petitioner never argued to the district court or to this Court on appeal that this section applies retroactively so as to preclude him from being subjected to a second mitigation hearing upon remand. In fact, Petitioner specifically sought a new guilt phase trial as well as a new mitigation hearing before the district court and argued on appeal that the district court erred in failing to grant his application for the writ on either basis. Now, after being provided the relief that he sought in the form of a new

mitigation hearing, Petitioner argues in a petition for rehearing that, because this Court's remand order failed to consider his after-the-fact argument that § 2929.06 may retroactively preclude him from being subjected to a new mitigation hearing, his case should be reheard. The relief Petitioner actually seeks from this Court *for the first time* by way of his petition for rehearing is an adjudication to the effect that the purely state law issue remains open in the Ohio courts as to whether § 2929.06 applies retroactively. *See State v. Gross*, 97 Ohio St. 3d 121, 2002 Ohio 5524, 776 N.E.2d 1061, 1114-16 (Ohio 2002) (Resnick, J., concurring in part and dissenting in part).

Issues raised for the first time in a petition for rehearing are generally not considered. *See United States v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993) (finding that the Court will not consider issues which are raised for the first time on appeal in a party's reply brief); *United States v. Cross*, 308 F.3d 308, 314 (3d Cir. 2002) (finding that raising an issue for the first time in a petition for rehearing en banc fails to preserve the issue for subsequent review). Thus, this Court should not consider Petitioner's retroactivity issue at this time, whether by issuing a supplemental order or otherwise. Furthermore, there is no reason to address the retroactivity issue as a part of the remand order since there is nothing in the original opinion's remand order to prevent the state court from deciding to entertain, or not to entertain, the retroactivity issue.

As to the § 2929.06 retroactivity issue, Petitioner's case is distinguishable from the petitioner's case in *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002). In *DePew*, the retroactivity issue was raised and squarely addressed by the district judge such that it was necessary for this Court to speak on it as well. Specifically, in the remand order in *DePew*, we opined as follows:

As a general rule, the relief given in a federal habeas case challenging a death sentence is a conditional order vacating the sentence unless the defendant is resentenced within a set period of time, usually 180 days. The magistrate judge herein recommended such a conditional order, but the district court judge did not adopt that recommendation because the law of Ohio, as it existed when defendant committed the crimes herein, did not allow imposition of the death penalty upon resentencing. On that basis, the district court instead granted an unconditional writ, vacating the death sentence. However, as recognized by the district court judge in his order, the matter of resentencing is for the courts of Ohio to address and we leave resolution of the state question to them.

For the foregoing reasons, the judgment of the district court is affirmed in part as to the vacating of the death sentence, reversed in part as to the grant of an unconditional writ and remanded with instructions to conditionally grant the writ unless the State of Ohio elects to initiate resentencing proceedings within 180 days of the district court's order.

Id. at 754. Thus, unlike in this case, in *DePew* the retroactivity issue was raised and addressed in the first instance by the district court.

Significantly, even though the issue of whether DePew could lawfully be resentenced to death was raised and addressed, this Court's remand order did not so much as imply that the state court should consider the issue before proceeding with the resentencing; rather, DePew's case was remanded "with instructions to conditionally grant the writ unless the State of Ohio elects to initiate resentencing proceedings within 180 days of the district court's order." *Id.* Thus, since this Court in *DePew* did not suggest that the state court could or should consider the retroactivity issue on

remand when the issue had been raised by the petitioner, we should not do so in this case where the issue was not previously raised.

Of course, Petitioner is free to raise the retroactivity issue before the state trial court, as he is free to raise any other defense as to why he should not be subject to the death penalty; however, where this issue was never raised by Petitioner up until this point, this Court should not use its heavy hand to urge the state court to consider it now. Indeed, the state court should not interpret the Supplemental Order as suggesting that it should or should not consider Petitioners retroactivity claim.

In summary, because the Supplemental Order appears to be issuing on an improper basis procedurally and is substantively unnecessary, I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3122

RICHARD M. FRAZIER,
Petitioner-Appellant,

v.

STEPHEN J. HUFFMAN, WARDEN,
Respondent-Appellee.

Filed: November 28, 2003

BEFORE: BATCHELDER, CLAY, and GILMAN, Circuit Judges.

OPINION
ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Case No. 3:98CV2098

Richard Frazier,
Petitioner,

v.

Betty Mitchell, Warden,
Respondent.

Opinion Filed: January 5, 2001

Before: James G. Carr, United States District Judge.

COUNSEL

David Paul Bradley, Steuer, Escovar & Berk, Cleveland, OH, for petitioner. Richard M. Kerger, Kerger & Kerger, Toledo, OH, for petitioner. Michael L. Collyer, Office Of The Assistant Attorney General, Cleveland, OH, for respondent. Karhlton F. Moore, Office Of The Attorney General, Columbus, OH, for respondent.

OPINION BY: James G. Carr

OPINION
ORDER

This is a capital habeas corpus case arising from the petitioner's conviction of two counts of aggravated murder and one count aggravated burglary. The petitioner has exhausted his state court remedies.

For the reasons that follow, the petition will be denied.

Introduction

A. Factual Background

The following summary of the evidence from the petitioner's trial is taken from the opinion of the Ohio Supreme Court affirming the petitioner's conviction on direct appeal. *State v. Frazier*, 73 Ohio St. 3d 323, 323-26, 652 N.E.2d 1000 (1995).

The victim, Tiffany Skiba, lived with her grandparents, Robert and Rita Skiba, in Cleveland, Ohio. On November 8, 1990, Mr. Skiba discovered Tiffany's body in her upstairs bedroom. Death had been caused by multiple stab wounds. Four days later the petitioner, Richard Frazier, was arrested and charged with the murder.

Petitioner had been married to the victim's mother from 1980 until 1989. In October, 1988, the Medina County, Ohio, grand jury returned a four count indictment against the petitioner. The indictment charged two counts of rape, one count of sexual battery, and one count of gross sexual imposition. The indictment named Tiffany as the victim of each offense. She allegedly had been impregnated by the petitioner.

The Medina County Court of Common Pleas ordered the petitioner to submit a blood sample for DNA testing to determine the paternity of Tiffany's child. He appealed that order to the state court of appeals and Ohio Supreme Court,

which upheld the trial court's order. The United States Supreme Court denied petitioner's writ of certiorari in October, 1990. Thereafter, the Medina Court of Common Pleas ordered petitioner's blood sample to be taken on November 13, 1990. Trial on the pending indictment was set for December 5, 1990, and then continued to January 14, 1991.

While the petitioner was on bond, Tiffany and her mother, Susan Bednarski, expressed fears that petitioner might harm Tiffany. Bednarski had seen the petitioner driving slowly past their house on numerous occasions. One of Tiffany's friends also saw the petitioner driving slowly by their house. When the friend told Tiffany what she had seen, Tiffany said, "Heather, oh, my God. He found me. He is going to kill me." Petitioner also was seen following Tiffany's school bus.

From September 1989 to May 1990 Tiffany received counseling. Her counselor testified that Tiffany was suicidal in October 1989. At a conference with her mother's attorney in October 1989, Tiffany was "petrified" during a discussion concerning the appellant. At a later visitation hearing attended by the petitioner, Tiffany appeared to be upset, "pale, shaky," and "very frightened."

After Tiffany moved in with her grandparents, she told her uncle that she was afraid of petitioner and of what he might do to her. She also told him that she slept with a knife under her pillow.

On several occasions the petitioner approached Tiffany's stepfather, David Bednarski. During one of these encounters, the petitioner indicated that he wanted to resolve some legal matters. After Bednarski stated, "That's up to the state and

the attorneys," the petitioner replied, "You use your attorneys. I'm going to do it in an illegal way." Petitioner's friends later threatened David Bednarski.

One week before Tiffany's murder, the petitioner sent her a Halloween card asking her to call him. Two days before the murder, the petitioner rented a car from the Cleveland airport.

On the day of the murder, Tiffany's grandfather, as was his custom, drove his wife to work around 5:00 a.m. He returned home about fifteen minutes later. On his return, Mr. Skiba noticed the family dog barking loudly and looking toward the back of the house. This behavior was unusual.

At approximately 10:00 a.m., he called to Tiffany to get up to get ready for work. Receiving no response, he went upstairs and found Tiffany's body in her bed.

Next to the body, police found a steak knife belonging to a set owned by her grandparents. The knife's blade was separated from its handle. Blood was on the bed and in the surrounding area. Police found smears of blood matching Tiffany's blood type on the right side of the stairway leading down from her second floor bedroom and on the door frame leading to the living room. Officers found human blood on the steak knife, bedroom ceiling, door frame to the rear door, and stairwell landing leading upstairs. The quantity was insufficient to determine blood type.

Entry to the house occurred through a basement window. The screen had been torn from the window and the pane of glass was broken. The window was partially open. The ground near the window was disturbed, and the door, normally closed, leading from the basement into the house was ajar.

Two footprints heading away from the murder scene were found in the neighbor's garlic bed on the other side of the fence separating the Skiba residence from their neighbor's home. From plaster casts of the prints officers determined that a size nine or ten boot sold exclusively by K-Mart had made the footprints.

On the morning of the murder the petitioner went to a medical clinic to have a one-inch cut on his right wrist treated. He appeared nervous and was pacing around the room. He said that he cut his arm at approximately 7:00 a.m. while working on his truck. The wound was consistent with a stab wound.

Later that day the petitioner contacted a friend to ask him to move his car. The friend declined, having heard a news report that the petitioner was a suspect in the murder of his former stepdaughter. Petitioner then contacted another friend, Jeffrey Weisheit, about moving his car. While the friend was driving the car, police stopped him and instructed the man to get out of the car. Before the officer had the opportunity to finish his commands, Weisheit exited the car with his hands in the air and began shouting, "Don't shoot."

The night of the murder, the petitioner drove his rental car to Ned Shamon's home in Sheffield Lake, Ohio. Shamon and the petitioner returned in Shamon's wife's car to petitioner's apartment to collect various papers and articles of clothing. The petitioner spent the ensuing weekend with the Shamons.

On November 12, 1990, Shamon followed the petitioner to a gas station, where he returned the rental car. A clerk, recognizing the petitioner from news reports, called the police. The clerk provided a description of the truck that had

followed the petitioner and its license plate number. Police found a human blood stain on the rental car's front passenger seat. The amount was insufficient to be typed.

After receiving the information from the clerk, the police went to Shamon's home and arrested the petitioner. Among petitioner's effects, police found a wristwatch with a human blood stain on the band, a pry bar stained with human blood, and a letter from the United States Supreme Court about the denial of his petition for certiorari.

In addition, the police found a receipt from K-Mart for a size nine boot with the same pattern on its sole as the boot which had left the print in the Skibas' neighbor's garlic garden. A knife with human blood traces and a towel smeared with petitioner's blood were found in his apartment. The blood on the knife was not suitable for typing.

Anthony Skiba, Tiffany's uncle, testified that he had shown the petitioner how to break into Skiba's residence through a basement window. The petitioner also was familiar with the basement and its storage area because he had stored personal items there while he and Tiffany's mother had been married.

On November 12, 1990, police officers read the Miranda warnings to the petitioner in the Medina County Jail. They asked petitioner a series of questions about Tiffany's murder. The officers noticed that petitioner had several bruises and abrasions on his hands and arms and a sutured cut on the outside of his right wrist.

On November 13, 1990, Cleveland police officers took the petitioner for the blood test ordered by the Medina County court. The test showed a 99.8% probability that petitioner fathered Tiffany's child.

On November 14, 1990, during a further interview with law enforcement officers, petitioner made indirectly inculpatory statements that were later introduced against him at his murder trial. At one point, he offered to tell the officers everything that happened, but wanted to do so only after he talked with an attorney. The officers then terminated the conversation.

B. Procedural Background

Count One of the indictment charged aggravated murder, defined as a purposeful killing while committing, or attempting to commit, or while fleeing immediately after committing or attempting to commit aggravated burglary. That Count contained three death specifications: 1) the murder was committed while committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated burglary and the offender was the principal offender or committed the murder with prior calculation and design; 2) the victim was a witness and was purposely killed to prevent her testimony; and, 3) the murder was committed for the purpose of escaping trial and/or punishment for another offense committed by him, to wit, rape.

Count Two also charged aggravated murder committed purposely with prior calculation and design. Count Two contained the same death specifications as Count One.

Count Three charged appellant with aggravated burglary. Trial lasted from August 5 through August 14, 1991. On August 16, 1991, the jury returned a verdict of guilty on all three counts and also found that the three specifications under Counts One and Two had been proven beyond a reasonable doubt.

At the mitigation hearing the petitioner made an unsworn statement denying his guilt. On August 19, 1991, the jury returned with a recommendation that petitioner be sentenced to death. The court followed the jury's recommendation, making an independent finding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Petitioner was sentenced to death on August 29, 1991.

The court of appeals affirmed the decision of the trial court. The Ohio Supreme Court affirmed the conviction and sentence. *State v. Frazier*, 73 Ohio St. 3d 323, 652 N.E.2d 1000 (1995). The United States Supreme Court denied the petitioner's petition for a writ of certiorari. *Frazier v. Ohio*, 516 U.S. 1095, 133 L. Ed. 2d 763, 116 S. Ct. 820 (1996).

On July 31, 1996, the petitioner filed a post-conviction relief petition in the trial court. Before doing so, he had filed a Motion for Expert Assistance, seeking funds to hire an investigator. The trial court denied that motion, which was renewed and again denied after the petitioner filed his post-conviction petition.

Finding that the petitioner's claims were barred by the doctrine of res judicata, the trial court dismissed the petitioner's post-conviction petition on November 26, 1996.

Thereafter, the petitioner filed a motion for relief from judgment. He based that motion on a report from a psychologist, who stated that testing should be undertaken to determine whether the petitioner was brain damaged. Petitioner also filed objections to the trial court's findings in its dismissal of the petitioner's post-conviction petition. On December 13, 1996, the trial court overruled both motions with a marginal entry.

Petitioner appealed the denial of his post-conviction petition to the court of appeals, which affirmed the trial court's decision on December 11, 1997. On April 1, 1998, the Ohio Supreme Court declined to accept petitioner's appeal for review on the basis that the petitioner had presented no substantial constitutional question.

The petitioner's habeas corpus petition asserts thirty grounds for relief, which will be discussed in the order in which they appear in the petition.

1. Failure of the Trial Court to Give a Cautionary Instruction re. Evidence Admitted Under Ohio R. Evid. 404(B)

Without objection at trial, evidence was admitted against the petitioner about 1) his alleged rape of Tiffany; 2) the pending state court indictment for rape; 3) the paternity of Tiffany's child; and 4) paternity testing procedures. In addition, the state's opening statement referred to petitioner's alleged sexual abuse of Tiffany, his indictment for rape, the paternity test, and the likelihood that petitioner was the father of Tiffany's child. The rape and paternity issues also were discussed by the state during the guilt and penalty phases of the trial.

The trial court ruled that the evidence was relevant to the death specifications in the murder counts of the indictment. Those specifications alleged that the murder was of a witness, and that it was committed to avoid prosecution.

No limiting or cautionary instruction was given when the evidence was admitted or discussed. In addition to not objecting to the admissibility of the evidence, the petitioner did not ask the court to give such instruction. As a result, the Ohio Supreme Court ruled that this claim was procedurally

defaulted. Accordingly that court declined to consider this claim on its merits, except to examine it on the basis of a possible manifest miscarriage of justice. *Frazier*, 73 Ohio St. 3d at 339. The court found no miscarriage of justice.

Review by a state supreme court of an otherwise procedurally defaulted claim to determine whether the error, if any, constituted a manifest miscarriage of justice does not revive the defaulted claim for purposes of federal habeas corpus review. *Paprocki v. Foltz*, 869 F.2d 281, 285 (6th Cir. 1989); *see also Scott v. Mitchell*, 209 F.3d 854, 868 (6th Cir. 2000) ("manifest injustice" review by Ohio Supreme Court of defaulted claim does not constitute waiver of the default).

In any event, even if the claim could be considered on its merits, despite the default, it is without merit. The Ohio Supreme Court has expressly declined to impose a duty on Ohio's trial judges to give a limiting instruction sua sponte when, without a request for such instruction, evidence comes in under Ohio R. Evid. 404(B). *State v. Schaim*, 65 Ohio St. 3d 51, 61-62 n.9, 600 N.E.2d 661 (1992). As the Ohio Supreme Court has pointed out, "the decision not to request a limiting instruction is sometimes a tactical one, and we do not wish to impose a duty on the trial courts to read this instruction when it is not requested." *Id.* Thus, the trial court in this case complied with state law when it did not sua sponte give a limiting or cautionary instruction about this evidence.

> The foregoing discussion assumes, moreover, that the petitioner properly characterizes this evidence as having been admitted under Rule 404(B). His characterization is incorrect.

The Ohio Supreme Court noted in its decision on petitioner's direct appeal that the evidence of the blood test

was admitted properly under Rule 404(B) to show motive. In addition, the Court stated that evidence about the rape prosecution "is inextricably linked to the circumstances surrounding [the] murder." As the Ohio Supreme Court in the context of a death penalty case has since made clear, evidence of motive that is "inextricably linked" to the circumstances of a charge offense is not governed by Rule 404(B). *State v. Coleman*, 85 Ohio St. 3d 129, 140, 707 N.E.2d 476 (1999). In *Coleman*, the Supreme Court, citing its earlier decision in the petitioner's direct appeal, stated:

> The admission of the underlying facts regarding the three separate drug sales tended to prove the essential elements of the specification. R.C. 2929.04(A)(8) requires that the state prove motive, and evidence was introduced to demonstrate that [the defendant] was the key witness against appellant and that her murder would hinder the state's case against him by preventing her testimony, which explained appellant's motive and deep obsession with killing Stevens. Thus, the drug sales are not considered "other acts" evidence limited by Evid. R. 404(B); rather, they were introduced to prove the R.C. 2929.04(A)(8) death-penalty specification.

(citing *State v. Frazier*, 73 Ohio St. 3d 323, 338-339, 652 N.E.2d 1000 (1995)). *Accord State v. Keene*, 81 Ohio St. 3d 646, 661, 693 N.E.2d 246 (1998) (evidence that a victim was murdered because she was a witness to a crime charged to the defendant not Rule 404(B) evidence).

Even if the evidence came in under Rule 404(B), the petitioner has not met his burden of showing that the federal Constitution requires, as a matter of due process of law, that the trial court sua sponte had to give a limiting instruction. The petitioner, rather, simply argues that he was entitled to a sua sponte limiting instruction under *Spencer v. Texas*, 385

U.S. 554, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967), and *Murray v. Superintendent, Kentucky State Penitentiary*, 651 F.2d 451, 453 (6th Cir.1981). Both cases involved habitual offender prosecutions. In *Spencer* the Supreme Court noted the efficacy and effectiveness of limiting instructions relating to evidence of prior convictions in an habitual offender prosecution. In *Murray* the court stated that, in such prosecutions, "it is unfair—and violative of due process—if evidence of other crimes is admitted without a limiting instruction." 651 F.2d at 453.

The statement in Murray was dictum. Neither it nor the Supreme Court's decision in Spencer establishes, as a matter of federal constitutional law, an entitlement to a sua sponte instruction whenever evidence is admitted under the "other acts" doctrine, as embodied in Ohio R. Evid. 404(B). As a matter of federal evidentiary law, moreover, the Sixth Circuit has held that no sua sponte instruction is required when evidence is admitted under Fed. R. Evid. 404(b). *United States v. Cooper*, 577 F.2d 1079, 1088-89 (6th Cir. 1978). There is, accordingly, no constitutional right to a sua sponte instruction limiting consideration of other acts evidence.

Having failed to show an established constitutional right to such instruction, petitioner is entitled to habeas relief only if the trial court's failure to give such instruction resulted in a fundamentally unfair trial. *See Smith v. Gibson*, 197 F.3d 454, 460 (10th Cir. 1999). The failure to give a limiting instruction about the rape, pending indictment, blood test, and putative paternity did not result in a fundamentally unfair trial in view of the direct connection between that evidence, petitioner's motive, and the killing. *Cf Amos v. State*, 849 F.2d 1070, 1073 (8th Cir. 1988) (no denial of right to a fair trial when trial court did not sua sponte give a limiting instruction about prior crimes evidence offered for impeachment pursuant to state evidentiary rule).

2. Admission of Evidence of Victim's Pre-Homicide Fear

Several witnesses testified about Tiffany's fear of the petitioner and her concern that he might harm her. According to Heather Vrutnski, Tiffany "appeared frightened, confused. She was scared." Kitty Keller testified that Tiffany was "very frightened. She was pale, shaky. Her voice was quivering." Joseph Bruzas, Tiffany's uncle, testified that "she said, 'You don't understand.' She goes, 'I'm scared.' [and] 'I sleep with a knife under my pillow.'" Tiffany's mother also related Tiffany's fear of the petitioner.

The state alluded to Tiffany's fears in its opening statement. The prosecutor told the jurors that "the evidence will show that Tiffany Skiba was in fear of, was terrified of one person in her short lifetime, and that person is sitting right over there, and that's Richard Frazier, the defendant." He also stated that "the evidence will show, ladies and gentlemen, in November of 1990 that Tiffany was sleeping with a knife under her pillow, that she was in obvious fear of her life."

The prosecutor returned to this theme in closing argument. He referred explicitly to the testimony of Heather and the victim's uncle, Joseph Bruzas. The prosecutor also commented that this "was a well-placed fear," and noted that Tiffany was "terrified" and "suicidal."

Defense counsel objected frequently to evidence and comments about Tiffany's state of mind.

Petitioner argues that this evidence was not relevant, and that its introduction violated his rights under the confrontation clause of the Sixth Amendment. In addition, he argues that admission of this testimony and the prosecutor's comments violated his right to due process of law.

To the extent that the petitioner challenges the trial court's ruling on relevance, his claim is not cognizable in this proceeding, absent a showing of a denial of fundamental fairness. Rulings on evidence involve state law, and erroneous rulings on matters of state law cannot lead to habeas corpus relief. *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) ("federal court may not issue the writ on the basis of a perceived error of state law"); *Moore v. Tate*, 882 F.2d 1107, 1109 (6th Cir. 1989) ("It is well established that 'while habeas review does not ordinarily extend to state court rulings on the admissibility of evidence . . . an erroneous evidentiary ruling which renders a trial fundamentally unfair warrants a writ of habeas corpus.'") (*citing Fuson v. Jago*, 773 F.2d 55, 59 (6th Cir. 1985)).

With regard to petitioner's confrontation clause claim, the Supreme Court described the showing he must make to prevail in *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980):

> where a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate indicia of reliability. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

The Ohio Supreme Court relied on the "state of mind" exception to the hearsay rule, as embodied in Ohio R. Evid. 803(3), as a basis for upholding admission of the testimony about Tiffany's fear of the petitioner. *Frazier*, 73 Ohio St.

3d at 337. The state of mind exception to the hearsay rule is "firmly rooted." *Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988); *United States v. Alfonso*, 66 F. Supp. 2d 261, 267 (D. P.R. 1999); *United States v. King*, 1997 U.S. Dist. LEXIS 16728, *33, 1997 WL 666778, *11 n.6 (S.D. N.Y.), *rev'd on other grounds, United States v. King*, 126 F.3d 394 (2nd Cir. 1997).

Other courts have held that evidence of a victim's fear of a habeas corpus petitioner does not violate the confrontation clause. *Barber v. Scully*, 731 F.2d 1073, 1074 (2d Cir. 1984) (admission of statement by a friend of the murder victim that on the day of her murder the victim had told the witness that she was afraid of the defendant did not violate confrontation clause); *United States ex rel. Jacques v. Hilton*, 423 F. Supp. 895, 899 (D. N.J.1976) (evidence that victim told witness that he was in fear of defendant and expected to be killed was within scope of state evidentiary rule; habeas confrontation clause claim rejected).

Even if the "state of mind" exception is not a "firmly rooted" hearsay exception, Tiffany's statements had sufficient indicia of reliability to be trustworthy. The petitioner had been seen following her. For two years he had resisted submitting to a blood test. She was substantially younger than the petitioner, and had been the victim of an emotionally traumatizing crime. n1 As a result of that crime, Tiffany had borne the petitioner's child. Tiffany's expressions of fear were repeated and consistent, rather than isolated.

n1 Following Tiffany's murder, but before his trial for that offense, the petitioner was convicted in Medina County on the rape and related charges that had been pending at the time of Tiffany's death.

Tiffany's statements about her fears, like those of the victim in *Moore v. Reynolds*, 153 F.3d 1086, 1107 (10th Cir. 1998), thus satisfy Sixth Amendment requirements. In that case, as here, more than one witness testified about the victim's statements, which also were otherwise corroborated. The "challenged statements supported each other, and [were] in turn supported by other evidence," so they could be viewed as trustworthy. *Id.*; *see also Hopkinson v. Shillinger*, 866 F.2d 1185, 1201, *rev'd on other grounds*, 888 F.2d 1286 (10th Cir. 1989) (victim's out-of-court statements, about which five other witnesses testified, that habeas petitioner threatened him and he feared the petitioner, possessed sufficient "indicia of reliability" to satisfy the Confrontation Clause).

Petitioner also claims that admission of testimony about Tiffany's fear of the petitioner violated his right to due process of law because its prejudicial effect so substantially outweighed its probative value as to cause the trial to have been fundamentally unfair. In response to the petitioner's challenge to this evidence, the state appellate court stated that the "evidence that Tiffany expressed fear when appellant made bond, the testimony that she was physically upset when he was seen driving by her home, and the fact that she slept with a knife under her pillow were relevant to prove appellant's identity as the murderer." *State v. Frazier*, 1994 Ohio App. LEXIS 598, 1994 WL 50703, *9 (Ohio App. 8 Dist.).

I agree with the state court's assessment of the relevance of this evidence. The identity of Tiffany's murderer was the critical issue in the trial. Her expressions of fear were probative because they supported the substantial evidence of petitioner's likely motive. In addition, the testimony that she said she was sleeping with a knife under her pillow pointed to the source of the wound observed after the murder on the petitioner's arm.

Even if the evidence were erroneously admitted, habeas relief would not be appropriate "unless the admission of the evidence rendered the trial 'so fundamentally unfair as to constitute a denial of federal rights.'" *Webster v. Rees*, 729 F.2d 1078, 1079-80 (6th Cir. 1984) (*citing Logan v. Marshall*, 680 F.2d 1121, 1123 (6th Cir.1983)). Federal courts sitting in habeas corpus proceedings are not concerned with state court evidentiary rulings unless such rulings result in a denial of due process. *Id.* I conclude that admission of this evidence did not cause the petitioner's trial to be fundamentally unfair.

The petitioner cites *United States v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758 (D.C. Cir. 1973), to support his challenge to the admission of evidence about Tiffany's fears. That case and its reasoning may well have provided support for a decision not to admit that evidence. But its relevance to the issues in this habeas proceeding is slight, because its holding that evidence of a victim's fear is inadmissible except in limited circumstances is based on evidentiary principles, rather than the constitutional requirements of due process and fundamental fairness. It is, therefore, not authority for finding that introduction of this evidence violated the petitioner's constitutional rights.

3. Description of Victim's Character

At several points during closing argument, the prosecutor referred to Tiffany's character and background. These references included a description of Tiffany as "this young, innocent girl," "a loving, caring individual," "that little girl," and "beautiful young lady," who, "in her death [was] a carved-up cadaver." The prosecutor also called on the jurors to remember Tiffany, and how she "was alive [and] had a right to live on the day she died," with the right, "which was

taken away by this defendant, to life [and] her youth, [and] her adolescence," "to go to college," "to walk down the aisle," and "to have a family."

Not content with his verbal depiction of the victim, the prosecutor used props to make his point. He placed an empty chair in the middle of the courtroom to "be representative of her." He called on the jurors to "most importantly, remember this girl right here, symbolically represented in this empty chair." After referring to Tiffany in death "as a carved-up cadaver," the prosecutor showed photographs to the jurors, telling them, "Take a good look. May it live with you the rest of your life."

The Ohio Supreme Court stated that "use of the empty chair was excessive." *Frazier*, 73 Ohio St. 3d at 341. The respondent does not dispute this characterization, which is well-taken. Stunts like this have no place in a fair and professional prosecutor's presentation. To the extent that they aid his cause, they increase the likelihood of reversal.

In determining whether the due process standard has been met, a federal court, under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), must conclude that the state court's decision is contrary to clearly established federal law. *Williams v.* Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1521-23, 146 L. Ed. 2d 389 (2000) (O'Connor, J. concurring). This showing is made only "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at , 120 S. Ct. at 1519.

Justice O'Connor's concurring opinion further stated in Williams that an "unreasonable application" occurs when "the state court identifies the correct legal principle from this Court's decision but unreasonably applies that principle to

the facts of the prisoner's case." *Id.* at , 120 S. Ct. at 1523. A federal habeas court may not find a state adjudication to be unreasonable "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at , 120 S. Ct. at 1522. n2

> n2 In *Nevers v. Killinger*, 169 F.3d 352, 371 (6th Cir. 1999), the Sixth Circuit held that the AEDPA did not vitiate the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), for determining harmless error. Under that standard, prosecutorial misconduct does not justify habeas corpus relief unless the misconduct had a "substantial and injurious effect or influence in determining the jury's verdict." The Supreme Court's decision in Williams appears to abrogate the ruling in *Nevers. Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000).

> The result in this case is the same even if the Brecht harmless error standard is applicable. As troublesome, improper, unwarranted, and unnecessary as the empty chair was, the petitioner cannot show under Brecht that the prosecutorial misconduct was "so egregious so as to render the entire trial fundamentally unfair." 507 U.S. at 637.

The Ohio Supreme Court correctly concluded that the prosecutor's gratuitous misconduct did not influence the jury and that his statements were not prejudicial. 73 Ohio St. 3d at 341. The depiction of Tiffany as young, innocent, beautiful, and caring do not appear either to have been inaccurate, based on evidence outside the record, or beyond inferences that fairly could have been drawn from the record. *See Byrne v. Butler*, 845 F.2d 501, 511-12 (5th Cir. 1988) (description of victim as decent and hardworking and

innocent of wrongdoing based on evidence before the jury and not fundamentally unfair); *Pierson v. O'Leary*, 959 F.2d 1385, 1389-90 (1992) (prejudicial impact from improper, irrelevant testimony about victim's hard-working character and effect of homicide on his family was minimal); *Alley v. Bell*, 101 F. Supp. 2d 588, 649 (W.D. Tenn. 2000) (testimony about victim's education, desire to join the Marines, and general friendliness and family's last contacts with her and decision not to have an open casket funeral did not have a substantial and injurious effect or influence in determining the jury's verdict where guilt was overwhelmingly shown). Likewise, the description of Tiffany as a "carved up cadaver" was accurate and not fundamentally unfair.

4. Misapplication of State Law re. Excusal of Jurors

The petitioner claims that the trial judge misapplied the standard of O.R.C. § 2945.25(C) for excusing jurors in a capital case. This claim raises only an issue of state law, which is not cognizable in a federal habeas corpus proceeding. *Estelle v. McGuire*, 502 U.S. 62, 71, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991); *see also Clemmons. v. Sowders*, 34 F.3d 352, 356 (6th Cir. 1994) (grant of excuse for cause, though arguably improper under state law, did not state a federal constitutional violation).

5. Excusal of Jurors for Views Against Capital Punishment

Petitioner claims that two jurors, Algirdas Nasvytis and Elisabeth Laskey, were excused improperly for cause on the basis of their views against capital punishment. In *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985), the Supreme Court prescribed the standard for determining when a prospective can be excused for cause based on his or her views about capital punishment. That standard, the court stated, "is whether the juror's views

would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Id.* at 424.

The trial judge's finding that a juror is impartial is a finding of fact entitled to the presumption of correctness under § 2254(d). *Id.* at 429; *Patton v. Yount*, 467 U.S. 1025, 1028, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984). Under § 2254(e)(1) the petitioner has the burden of rebutting this presumption by clear and convincing evidence. *Alley v. Bell*, 101 F. Supp. 2d 588, 650-51 (W.D. Tenn. 2000). Review by this court is limited to determining whether the state court record "fairly supports" the trial judge's finding on this issue. *Rushen v. Spain*, 464 U.S. 114, 120, 78 L. Ed. 2d 267, 104 S. Ct. 453 (1983). The trial judge need not have issued written findings of fact, provided that the finding is evident from the record. *Witt, supra*, 469 U.S. at 430.

In response to questions from the trial judge, Juror Nasvytis initially stated that he had "no position" on the death penalty. Tr. 234. Then, however, he stated that he would have a problem in voting for the death penalty if the law so required. *Id.* at 235. This was based on his personal belief that he was "not sure—that capital punishment is warranted," and that he would be "more inclined toward life imprisonment with no parole or something . . ." *Id.* at 235-36.

Mr. Nasvytis also acknowledged that he would have to put his personal feelings aside and follow the law as given to him by the court, even if it conflicted with his personal feelings. *Id.* at 236.

On further questioning by the prosecutor, Mr. Nasvytis stated that he "tended to lean toward being against the death penalty." *Id.* at 241. He stated that he could listen to the testimony during the guilt phase and, based on that testimony, return a verdict. *Id.* When asked whether he

"would be able to sign a piece of paper that authorizes the imposition of death on this defendant," he responded, however, "it would be hard for me to do that." *Id.* at 242). In answer to a question about whether he could "do it," he stated, "Well, then I don't know until I get there . . . it would be hard for me to do it. I think that I probably would have to do it . . . if I felt there was no doubt in my mind that the individual was guilty of all the crimes . . . ." *Id.* at 242-43. He stated that he "probably" would hold the state to a higher standard of proof than beyond a reasonable doubt because of the death penalty. *Id.*

Mr. Nasvytis said that it was not the case that he would be unable to vote for the death penalty, no matter what the evidence was. *Id.* at 243-44. When asked whether he would be able to "sign a verdict imposing the death penalty," he stated, "I think so." But when then asked whether there was "any doubt in your mind that you could," he responded, "Yes, there is." *Id.* at 244.

When asked by defense counsel whether he thought he could be a fair and impartial juror during the guilt phase, Mr. Nasvytis responded affirmatively. *Id.* at 248. After posing questions, as to a number of which objections were sustained, about the legal aspects of aggravating and mitigating factors, the defense attorney asked Mr. Nasvytis if he could "fairly consider all three options?" To which he responded, "Uh-huh." *Id.* at 249.

The defense attorney later asked Mr. Nasvytis whether he "could follow the law" if it stated that he had to impose the death penalty. To which Mr. Nasvytis responded, "it would be difficult for me to do anyway." *Id.* at 252. After reaffirming his ability to determine guilt or innocence, Mr. Nasvytis, in response to a final question from defense

counsel as to whether he "would follow the law and vote to impose the death penalty," stated, "Yes, I would say yeah." *Id.*

Thereafter, after a couple of preliminary comments by the trial judge, the following colloquy ensued:

> Judge: I need to know if you can make the commitment to me that you will set aside your personal feelings and you will follow the law as I give it to you. In other words, if the law requires you to vote for the death penalty, will you commit to me that you will do so even if it violates your personal feelings?
>
> Juror: Well, if it violates my personal--my personal beliefs, my moral beliefs, I couldn't do it, no matter what you said . . . . I can do everything up to that point.
>
> Judge: If the law requires that you vote for the death penalty, will you, in fact, do so?
>
> Juror: No, not if I don't believe it is right.
>
> Judge: What if the law says that under these circumstances you must vote for the death penalty and you find that those circumstances do exist?
>
> Juror: Whose law?
>
> Judge: Our law.
>
> Juror: Not if I felt that it was morally incorrect, I couldn't do that, no.

> Judge: So you cannot commit to me that you will follow the law and impose the death penalty if the law requires you to do so?
>
> Juror: I can't, because I don't feel bound by that more than I do by my own beliefs.

Id. at 253-54.

Thereafter, the defense attorney asked, "You are not saying that there are no circumstances where you could vote to impose the death penalty; is that a fair starting point?" In response, Mr. Nasvytis stated, "I have never been put in a situation where I had to be directly responsible for someone's death. So that I—for that reason I don't know what I would—how I would respond if I was in that situation." *Id.* at 254.

After acknowledging that his concerns had to do with his moral principles, *id.* at 254-55, Mr. Nasvytis that "I don't care what the law is, okay, I am going to do what I think is right." *Id.* at 256. When asked if he could "follow the law and do [the] weighing process," Mr. Nasvytis stated, "certainly my feelings against the death penalty would affect . . . how I would weigh those, ..." *Id.* at 257-58. In response to the defense attorney's final question, "So that, in a properly proven case, . . . you could follow the law and impose the death penalty," Mr. Nasvytis stated, "Depends—I suppose I could." *Id.* at 258.

After this answer, the trial judge asked, "What does that mean, sir, you suppose you could?" To which Mr. Nasvytis answered, "Well, I think it means depending on—let's say that one of my relatives was the—the individual, the victim, let's say, I would suppose that in that case my—my vacillating would vacillate toward the more serious choice." *Id.*

At sidebar, the trial judge stated that, "This gentleman has indicated that under some circumstances, if a relative were a victim, he would follow the law; in other circumstances, he would not follow the law. He does not believe he is bound by the law." *Id.* at 259-60.

On questioning by the prosecutor, Mrs. Laskey stated that she had "serious reservations about" the death penalty and "reservations that it serves a useful purpose." *Id.* at 386. Asked if she had "serious doubts," she said, "Yeah." *Id.* When asked if she would "be able to pick up the pen, sign your name on that death penalty verdict," she stated, "I really don't know," and "I think I would have so many reservations I may not be able to do it." *Id.* at 387-88.

Mrs. Laskey indicated that her reservations were based on her belief that the death penalty, in effect, was "like saying I am going to murder you to teach you not to murder." *Id.* at 388. Asked if she thought "it is wrong to execute or wrong to murder, whether the state is doing it or whether someone else is doing it," she replied, "Yes," and acknowledged that she did not want to be a part of it. (*Id.*). When the time came to sign her name on a death verdict, she repeated, she would "probably have really sincere reservations." *Id.*

Mrs. Laskey also indicated, however, that "the law has to be obeyed regardless of my personal feelings." *Id.* at 389. On then being asked, "would you follow the instructions of the law," she responded, "I am still not sure, I guess. Seriously, I am not sure. Maybe I wouldn't. I better not. I better say no, I couldn't follow the law." *Id.* In conclusion, she stated, "I don't think I could take that responsibility. I think my feelings about the death penalty being a deterrent is too deeply engraved. I don't think it is a deterrent. I don't think it

solves anything, to kill someone or killing someone." *Id.* at 390. These feelings, she stated, were not religiously based, though she thought "it ethically makes sense." *Id.*

When questioned by defense counsel, Mrs. Laskey stated that she did not have a problem sitting in judgment as to the guilt or innocence of a person charged with a crime. *Id.* at 390-91. She acknowledged that there might be "times I probably would feel" that a crime had been "so heinous I probably would" be able to return a death verdict. *Id.* at 392. Asked later that if "the law says in this circumstance [you] have to follow the law, that you would follow the law," Mrs. Laskey answered, "I can probably follow the law and put my personal bias against the death penalty aside, if I had to make that decision what the law says had to be done." *Id.* at 395-96.

The following colloquy then ensued between the trial judge and Mrs. Laskey:

> Judge: . . . I need a commitment. . . that you will follow the law, even if the law requires you to sign you name to a verdict in which you are voting for the death penalty.
>
> Will you make that commitment to me or can you make that commitment to me?
>
> Juror: No, I don't think I could.
>
> Judge: You cannot?
>
> Juror: I don't think I could.
>
> * * * *

Judge: . . . So, what I am telling you is, ma'am, you may be personally against death, but you would have to set aside your personal feelings, and even if you believe in your heart that, no, I really don't want to impose death in this case but the law tells me I have to, I am asking you, will you set aside what your heart tells you and do what the law says? And I need to know if you will make that commitment to me. I know we are not asking you easy questions, but I think you can appreciate we need the answers.

Juror: Yeah, that I need to follow the law instead of a personal feeling regarding—

Judge: What I need to know is can you make that commitment to me?

Juror: No, I don't think I could. I couldn't say I could.

Judge: You cannot say unequivocally you will follow the law even if it is against your personal feelings?

Juror: Probably not.

Judge: If it is against your personal feelings, that's what I should have said.

Juror: No, I probably couldn't.

* * * *

Judge: That's what it really comes down to.

Juror: No, I think probably my feelings against the death penalty would be so strong I couldn't follow the law. I will not follow the law, would be better, no probably won't follow the law.

Id. at 396-98.

When questioned further by the defense attorney, as to whether "it would take a lot to convince you that the aggravating circumstances outweighed beyond a reasonable doubt the mitigating factors," Mrs. Laksey acknowledged that that was "fair." *Id.* at 399-400. In response to the question, "you couldn't say under no circumstance would you follow the law and impose the death penalty; isn't that a fair statement," Mrs. Laskey answered, "Yes." *Id.* at 400. She gave the same answer to the question, "you have said there are circumstances where you could consider it." *Id.* Asked, "can you follow the law and apply the law in this case even if the law said that you had to impose the death penalty," Mrs. Laskey answered, "Yes, I know the law would take precedence over my personal feelings about the death penalty." *Id.* at 402.

Mrs. Laskey again was asked by the court, "are you now making the commitment that you will, in fact follow the law, and if the law requires you to vote for death, you will do so, even if it is against your personal feelings, even if your heart tells you differently." In response, Mrs. Laskey stated, "I think I would have to follow the law until it was changed." *Id.* To this, the court responded, "Ma'am, I need something stronger than I think I might have to. You understand, I need something stronger than I think I might, probably I will. I need a commitment. This is too important. I need a commitment that you will follow the law even if it is totally against your heart." This, in turn, led to the response by Mrs. Laskey, "No I don't think I can give you that commitment." *Id.*

The petitioner claims that the trial judge improperly asked the prospective jurors to make a commitment to follow the law and the court's instructions. Such questions from the

court are not improper, as Justice Kennedy noted in his dissenting opinion in *Mu'Min v. Virginia*, 500 U.S. 415, 451, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991) (Kennedy, J., dissenting). A trial judge, Justice Kennedy stated, can properly "evaluate impartiality by explaining the trial processes and asking general questions about the juror's commitment to follow the law and the trial court's instructions." Indeed, here, as in *Zuern v. Tate*, 101 F. Supp. 2d 948, 988 (S.D. Ohio 2000), "the Petitioner has not cited a single case which would support the proposition that the Eighth Amendment or any other provision of the United States Constitution is violated, when . . . such a commitment from potential jurors" has been secured.

Voir dire of each juror was extensive. Both expressed reservations, based strongly held personal beliefs, about their ability to impose capital punishment. Although some portions of the jurors' responses may be viewed as expressing a willingness to follow the law, the totality of their responses provides ample support for the trial judge's decision to excuse them for cause.

The petitioner has, in any event, failed to overcome the presumption of correctness applicable to the state judge's findings of inability to follow and apply the law. In addition, applying the rigid standard of AEDPA, it is clear that the decision to excuse these jurors was neither "contrary to, nor involved an unreasonable application of clearly established federal law" and was not "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

6. Denial of Defense Challenges to Jurors

The petitioner claims that the trial judge applied different standards when considering defense challenges to jurors, and improperly denied defense challenges to two of the jurors for cause. The finding that the jurors could disregard their

personal beliefs favoring the death penalty and return a verdict consistent with the law is subject to the presumption of correctness. *Patton, supra.*

The first juror whom the petitioner claims should have been excused for cause due to her beliefs regarding capital punishment was Judy Ballard. When asked by the trial judge whether she had a "position for or against the death penalty," Ms. Ballard stated, "For." Tr. 653. After Mrs. Ballard stated that she would vote for the death penalty if the law so required, the trial judge asked her if she would likewise "follow the law that says you cannot vote for death . . . [and] must vote for a lesser penalty." To which she responded, "Yes." *Id.*

Then the trial judge asked her if she could "commit to us that you will set aside your personal feelings regarding the death penalty and simply follow the law, even if it is in conflict with your personal feelings." Ms. Ballard again answered, "Yes," as she did when asked, "You will follow the law?" *Id.*

The prosecutor, after asking if Ms. Ballard could return a death sentence, also asked, "if the law required a different penalty, the penalty or the other option of life imprisonment with the possibility of parole after serving a full 20 or 30 years, if that's what the law required, you would be able to do that, also." *Id.* at 658. Ms. Ballard answered affirmatively. *Id.*

When asked by defense counsel whether "in some cases she might feel it was more appropriate for capital punishment," Ms. Ballard responded, "Most cases, yes." *Id.* at 660. She answered, "Yes," to the question, "if someone has been proven to have killed somebody, do you generally feel that capital punishment should be imposed?" *Id.* at 660-61. "Would you say," the defense attorney then asked, "that

if a person has been proven to have killed somebody, that he should be put to death?" In response, Ms. Ballard stated, "If he has been proved to kill someone, yes." *Id.* at 661. Ms. Ballard also answered, however, "No," when asked, whether she had a "problem" with moving on to "some other penalty" if the "death penalty may not have been proven." *Id.*

Ms. Ballard stated that she could consider, as a possible sentence, thirty years before parole eligibility. But, when asked if she would "have any problem with that," she answered affirmatively. *Id.* at 663. Her problem was that "the person shouldn't be paroled. It should be a life sentence." *Id.* She agreed with the defense attorney's statement, "that because of the possibility of parole that maybe there should be a death penalty," and acknowledged that "that would be on [her] mind." *Id.* She also stated that she did not agree with the possibility of parole after twenty years. *Id.* Asked if it were a fair statement "that if the defendant is found guilty of aggravated murder, that you would impose the death penalty because you don't agree with the 30 years or the 20 years," Ms. Ballard said, "Yes, that's correct." *Id.* at 660-61.

Next the trial judge asked Ms. Ballard, "would you automatically impose the death penalty without consideration of the law?" To which Ms. Ballard responded, "No." *Id.* at 661. When asked what her earlier answers meant, Mrs. Ballard stated that, "anyone who is killing someone shouldn't be out." *Id.*

At this point, the following colloquy occurred:

> Judge: What if I were to tell you that our law does not believe that, that that's not how our law is set up? Would you set aside that personal feeling?
>
> Juror: I could. It would be hard, but I could.

Judge: It may very well be hard. But I need to know--and there are no right or wrong answers here, ma'am. I need to know if you will commit to all of us that you will set aside your personal feelings being in favor of the death penalty and if you will follow the law, and if the law tells you that you have to consider certain factors that I will give to you, you will consider those factors. Will you make that commitment to me?

Juror: Yes.

Judge: And will you make the commitment to me that if the State doesn't meet their burden of proof of the aggravating circumstances outweighing the mitigating factors, will you commit to me that you will not vote for death?

Juror: Yes.

Judge: Even though you may not like it, you have to make that commitment to me. If you can't make that commitment to me, you have got to tell me now.

Juror. I could make that commitment.

Judge: Okay. And on the other hand, if the State does meet its burden of proof in the penalty phase, you will vote for death?

Juror: Yes.

Judge: Do you understand my concern here is I think I have heard two different answers from you, and I need to know—I know you are in favor of the death penalty, and I know you believe that if you take a life, your life should be taken. But I cannot stress enough, ma'am, that is not our law.

Will you accept the law or will your personal feelings override what I have told you?

Juror: I will accept the law and put my personal feelings aside.

Judge: You are sure you can do that?

Juror: Yes.

Judge: You are positive?

Juror: Yes.

Id. at 664-66.

When asked by the defense attorney if she could put aside her feelings, Ms. Ballard stated that "I have to put aside my feelings." *Id.* at 666. During the course of further questioning of Mrs. Ballard by defense counsel, the court interjected, and asked, "But as you sit here now, do you have an open mind to various possibilities, or, as you sit here now, are you definite that if he is found guilty, I am going to vote for death?" *Id.* at 670. Mrs. Ballard answered, "I don't know. It depends. It might not be the rule . . . The death penalty might not be the rule." *Id.* at 671.

This, in turn, led to some further questions by the court:

Judge: . . . If I tell you you can consider A, B, C, D, E, okay, if I list of things that you can consider, that negate the death penalty, will you consider them?

Juror: Yeah. I have no choice.

Judge: Okay. So you will consider them and determine, according to the law, whether or not you should impose the death penalty or a lesser penalty?

Juror: Yeah.

Judge: Do you have an open mind as you sit here right now?

Juror: Yes.

Id. 671-72.

After this series of questions from the trial judge, petitioner's attorney asked that, if she didn't agree with the list of mitigating factors given by the judge, "would you still feel that you should have to give the death penalty?" Mrs. Ballard answered, "No." The defendant attorney's final question was, "You could set aside your own personal feelings and move on to one of these other areas?" To which Mrs. Ballard responded, "Yes." *Id.* 672.

Defense counsel initially passed for cause. He then reversed himself, and objected. The court denied the challenge. *Id.* 673.

The other juror who, according to the petitioner, should have been dismissed for cause was Harold M. Wills. As the outset of his voir dire the court asked, "Do you have a position for or against or no position at all as to the death penalty," to which Mr. Wills responded. "No." *Id.* at 730. But then he said, "No. If he deserves it, give it to him, that's what I say." *Id.* at 731.

After explaining the two distinct phases of the trial and the weighing of the aggravating and mitigating factors, the

court asked, "Will you, in fact, follow the law that would require you to vote for death?" *Id.* Mr. Wills answered, "I think I would."

In response to the next couple of questions, Mr. Wills indicated that he was confused. This led to the following exchange:

> Judge: Under certain circumstances the law requires you to vote for death. Would you follow that law that would require you to vote for death?
>
> Juror: Oh yeah.
>
> Judge: You would vote for death, if you had to?
>
> Juror: Sure, yeah.
>
> Judge: On the other hand, if other circumstances exist, the law says you may not vote for death, you must consider a lesser penalty of life imprisonment with parole eligibility after 30 years or 20 years. Would you follow the law that says no, you cannot vote for death, you have to vote for lesser penalty?
>
> Juror: I would follow the law.
>
> Judge: So if the law says you can't vote for death, would you follow that law?
>
> Juror: Yes.
>
> Judge: . . . Will you put aside all of your personal feelings regarding the death penalty, put them all aside, and just simply follow the law, even if the law is different than your personal feelings?

Juror: I would have to.

Id. at 732-33.

When asked by the prosecutor if he could "vote for the imposition of death in this case," Mr. Wills responded, "I think I would." *Id.* at 736. After being told by the prosecutor, "We need something more than that. We need either you can or you can't do that. We need to know now," Mr. Wills repeated, "I think I can do it." *Id.* When asked if he could "sign your name . . . if the law says it is an appropriate penalty," Mr. Wills agreed he could do so. *Id.*

Mr. Wills also agreed with the prosecutor, when asked about his initial statement ("If he deserves it, give it to him"), that he meant to express that if the law says death is appropriate, he could follow the law. *Id.* He reconfirmed his ability to set aside his personal feelings and acknowledged his ability to follow the law regarding alternative punishments and impose a lesser sentence. *Id.* at 736-37.

After some initial questions from the defense attorney, Mr. Wills expressed incomprehension about the fact that a person convicted a year and a half earlier of murder of a police officer was still alive. *Id.* at 739. Asked if he thought that person should be put to death for what he did, Mr. Will stated, "Sure I do, sure." *Id.* He agreed with the statement that if someone "kills another person, that he should be put to death." *Id.* at 739-40.

At this point, the following colloquy occurred between defense counsel and Mr. Wills:

Attorney: Now, the law in Ohio says that if the prosecutor proves these aggravating circumstances and that they outweigh mitigating factors that the

defense would put on, and they prove this beyond a reasonable doubt, that the jury should return a death penalty verdict. Do you agree with that?

Juror: Sure.

Attorney: Now, the law also provides that there are certain mitigating factors or factors that would lessen against the death penalty to make a lesser penalty.

Can you think of anything in your own mind that would cause you, in relying on these mitigating factors as defined by the law, to change from the death penalty verdict?

Juror: No.

Attorney: So that because of the fact that there was this type of a murder or there was a murder, the taking of somebody else's life, you would feel—or you would vote for the death penalty?

Juror: I sure will.

Attorney: You would not be able to consider any other—

Juror: Huh-uh.

Attorney: —mitigating factors?

Juror: No.

Attorney: How much has this to do with [that other] case or is this your own—

Juror: That's my own feeling.

Attorney: This is your own feeling overall?

Juror: All you have to do is look at the state of Michigan, Detroit, Michigan. They don't have a death penalty.

Attorney: And what are you saying about the state of Michigan and the city of Detroit?

Juror: I got a daughter that lives in Michigan. I don't like to go to Michigan.

Attorney: So you are saying that your personal feelings because of your own daughter's situation, the state of Michigan and everything that's going on in Detroit—

Juror: Yeah.

Attorney: —that you would not be able to put these aside—

Juror: No.

Attorney: —and that you would not be able to follow the law with respect to mitigating factors?

Juror: Yeah, I would be able to follow the law.

Attorney: Well, you are saying you can follow the law, but the law is that a juror can consider mitigating factors that would lessen the penalty from death to something else.

Juror: No, I wouldn't. I don't go for that.

Attorney: You could not follow the law in that respect?

Juror: Well, I would have to follow the law.

Attorney: Well, let me go further, sir, and say if you found the defendant guilty of the crime as charged in the indictment, would you keep an open mind in the penalty phase to something less than the death penalty.

Juror: Well, I guess I would. I think I would.

Attorney: You say it very reluctantly, don't you?

Juror: Yeah, yeah.

Attorney: Sir, I need a commitment from you that you would keep an open mind in the penalty phase and that you would be able to consider something other than death if I told you that that is what the law required you to do. Would you be able to?

Juror: Yeah. Oh sure, yeah.

Attorney: Are you sure?

Juror: Sure.

Attorney: So, if you found the defendant guilty, you wouldn't automatically vote for death, would you, or would you?

Juror: No, I wouldn't automatically vote for death. But if—if the law required him to die,

I would say, yeah, kill him.

Attorney: But what if the law said to you that you have to consider all these other factors, that's in opposition to imposing death, would you be able to consider all of the other factors?

Juror: Sure.

Attorney: You would?And would you be able to return a verdict less than death?

Juror: Such as life imprisonment?

Attorney: Yes.

Juror: Yeah.

Attorney: You would be able to?

Juror: Sure.

Attorney: No doubt in your mind?

Juror: That's right.

Id. at 740-44.

Thereafter, the defense attorney asked, "you wouldn't be able to put aside your personal feelings and beliefs and consider something that would take away the death penalty in something like this?" Mr. Wills responded, "Sure, I could . . . . I wouldn't have to give him the death penalty . . . . I could vote for life imprisonment. I could do that." *Id.* at 745. Asked if he "will be able to consider reasons that could lessen the death penalty," Mr. Wills replied, "Yeah." *Id.* at 746.

When asked specifically if he could consider the something less than the death penalty in a case involving a charge of purposeful killing of a witness who was the defendant's stepdaughter, Mr. Wills repeated, "Yeah, I could consider it." *Id.*

The court denied the defense motion to excuse for cause. The judge noted that Mr. Wills had given "two different answers, one to the State and a different one to [the defense]," and that she had "tried to make my questions as neutral as possible to see if he could make the commitment or not. He said yes . . . . I have to go based on the answers." *Id.* at 747.

The Supreme Court of Ohio succinctly and accurately responded to the petitioner's contention that the trial judge applied different standards to the state's and defense's challenges for cause:

> The trial judge did not apply different standards in ruling upon defense challenges for cause than it did for the state's challenges. The distinction is that Laskey and Nasvytis both stated that they could not put aside their personal feelings and would not be able to follow the law. Ballard and Wills stated that they would be able to put aside their personal feelings and they would apply the law as instructed by the trial judge.

73 Ohio St. 3d at 329-30.

This conclusion is amply supported by the record. As to both jurors challenged unsuccessfully by the petitioner, the trial judge had an ample basis for concluding that their personal beliefs supportive of the death penalty could be set

aside. This is the same standard followed by the trial court when it considered the defense challenge to the other jurors. n3

> n3 Petitioner did not inform the trial judge that, in his view, she was applying differing standards to her assessment of the ability of different jurors to set their personal beliefs to one side. His present claim could, accordingly, have been deemed waived had the state chosen to assert waiver in response to petitioner's direct appeal on this issue.

The petitioner's conclusory assertions do not overcome the presumption of correctness applicable to the state judge's findings that the challenged jurors could follow and apply the law. The decision to overrule the challenge to these jurors was, in any event, neither "contrary to, nor involved an unreasonable application of clearly established federal law" and was not "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

7. Prosecutorial Misconduct During Sentencing Phase

The petitioner claims that the prosecutor's closing argument during the sentencing phase improperly inflamed the passions of the jury when he displayed Tiffany's bloody clothing, referred to the petitioner as a rapist, and commented on facts not in evidence, the heinousness of the crime, and the petitioner's unsworn statement to the jury. Objections were sustained to many of these statements.

a. Bloody Clothing

The prosecutor referred to Tiffany's bloody clothing at various points in the state's sentencing phase argument. In his opening statement, he had referred to the pans of the

scales of justice; as he began his closing argument, he said, "Here is sits in the right pan . . . , Tiffany Skiba, with her blood soaked clothes, soaked as she lay there, dying with each of these stab wounds in her and each of these torture wounds in her." Tr. 2767. Objections to these references were overruled.

The clothing properly was admitted to show the manner and means of the assault and ensuing death. *See Todd v. Stegall*, 2000 U.S. Dist. LEXIS 6798, 2000 WL 654960 (E.D. Mich. 2000) (comment that victim's clothing, as shown in a photograph, was consistent with being shot at close range, not improper); *see also United States v. Bamberger*, 456 F.2d 1119, 1127 n.5 (3rd Cir. 1972) ("'Pistols, fruits of the crime, clothing, parts of the body of the person killed, everything pertaining to the crime which will aid the jury in its consideration of the (alleged) crime and the guilt or innocence of the accused, is admissible.' This has been the law for centuries.") (citation omitted). *See generally* Anno, "Admissibility, in Homicide Prosecution, of Deceased's Clothing Worn at Time of Killing," 68 A.L.R.2d 903, § 2[a] (1959) ("In homicide prosecutions, the general rule is that the clothing worn by the victim at the time of the killing is admissible in evidence, even where its introduction may be prejudicial to the accused, if it tends to shed light upon a material inquiry in the case."). A prosecutor properly may refer to admitted evidence in closing argument, and that is what occurred with regard to the references to the bloody clothing.

Later, the prosecutor stated that Tiffany "is not here. We have bloody clothing to represent her." Tr. 2801. The court overruled an objection by the defense. This statement is an appeal to the jury's sympathies, and approaches, if it does not cross over, the boundary line of fair argument. It did not, however, deprive the petitioner of a fundamentally fair trial.

After the jury had been charged, the defense made the following statement and objection: "We would like the record to reflect that a small chair was placed in front of the jury when the prosecutor was arguing about Tiffany Skiba and that her bloody shirt was draped over that and that they put that evidence on that chair in front of the jury during their argument." Tr. 2825. The trial court overruled the objection on the basis that the objection was untimely. The court of appeals sustained the ruling on the basis of procedural default. 1994 WL 50703 at *11. This issue, accordingly, cannot be considered on its merits.

If it could be so considered, the petitioner would not be entitled to relief. As discussed in subsection 3, *supra*, the prosecutor's use of these props was unprofessional, improper, and excessive, and raised the potential for reversal. Even when coupled with the prosecutor's reference to Tiffany's bloody clothing as representing her, this gratuitous and unjustified appeal to the jurors' sympathies did not deprive the petitioner of a fundamentally fair trial.

b. Reference to Petitioner as a Rapist

As he was describing the crime, and after referring to the petitioner's anger, the prosecutor asked, "Who else would rape a 15-year-old girl?" The court sustained an objection to this rhetorical question. Tr. 2782. Later the prosecutor stated that Tiffany "was his victim. Richard Frazier's victim, the rapist, the murderer." The petitioner's objection to this statement was sustained. Tr. 2802.

Because the objection was sustained, the jury must be presumed to have disregarded these statements. *Greer v. Miller*, 483 U.S. 756, 767 n.8, 97 L. Ed. 2d 618, 107 S. Ct. 3102 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an

'overwhelming probability' that the jury will be unable to follow the court's instructions"); *United States v. Ford*, 872 F.2d 1231, 1239 (6th Cir. 1989) (same). This presumption has not been overcome.

c. Reference to Matters Outside the Record

During closing argument the prosecutor referenced several matters outside the record. He said, "We know there is no evidence of her having any other enemies anywhere." Tr. 2771. An objection was sustained. At a later point the prosecutor stated: "I never had the privilege of meeting her, but I feel that I know her well"; "I had a chance to meet her family, and they are all beautiful people"; "There is a tendency . . . [to] go from one case to the next case. That's not the case with Tiffany Skiba." Objections to each of these comments were sustained. Tr. 2802-03. The presumption that the jury would disregard these comments has not been overcome.

d. Reference to Heinousness

The prosecutor stated at one point in his closing argument, "there are some crimes that are so heinous they do not deserve to be rewarded." Tr. 2796. There was no objection to that statement, which was isolated and generic. Use of that term did not deprive the petitioner of a fundamentally fair trial.

e. Comment on Petitioner's Silence

As he began his closing argument, the prosecutor stated that the petitioner "hasn't shown the slightest bit of remorse, which would be some mitigation, some regret, some explanation, some sorrow, some acknowledgment of wrongdoing, which he was given the opportunity of the 14th of November, explain it. Why, why. And he cannot do it. He

will not do it." Tr. 2767. Without an accompanying limiting or cautionary instruction, the trial court sustained an objection. Later the prosecutor said, "He has no alibi, no alibi witnesses." Again an objection was sustained. Tr. 2795.

There is no reason to believe that the jurors did not abide by the court's sustaining of the objection and disregard these statements.

In any event, the references to the failure of the petitioner to acknowledge his "wrongdoing" and "explain it" on November 14th and his lack of an alibi and alibi witnesses were not improper. Under the Supreme Court's decision in *Anderson v. Charles*, 447 U.S. 404, 65 L. Ed. 2d 222, 100 S. Ct. 2180 (1980) (per curiam), a suspect who elects to discuss a particular subject with police after receiving Miranda warnings may be questioned about inconsistencies between that discussion and his later trial testimony. This rule applies where, as here, the defendant does not testify, but his version of events is placed before the jury. *United States v. Hoac*, 990 F.2d 1099, 1104 (9th Cir. 1993).

Here the defendant asserted his innocence in his unsworn statement to the jury. That assertion was inconsistent with the petitioner's statements to the investigators who met with him in the Medina County jail. It was, therefore, permissible for the prosecutor to call attention to the petitioner's failure to "explain" his "wrongdoing" at that time and to provide an alibi and alibi witnesses.

Later, using the image of the scales of justice, the prosecutor stated, "against what's in this pan. Nothing is in this pan. Nothing has been brought in to weigh it down. Nothing has been put in here to bring it down and force the weight of Tiffany Skiba and the three locomotives on her lap up. Nothing has brought that up." Tr. 2797. Two objections during this statement were overruled.

There was no violation of the rule of *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965), which prohibits comment about a defendant's exercise of the right not to testify. These statements were not "manifestly intended" as a comment on the petitioner's exercise of his right not to testify during the guilt phase. Thus, no Griffin violation occurred. *See United States v. Bond*, 22 F.3d 662, 669 (6th Cir. 1994); *Bagby v. Sowders*, 894 F.2d 792, 797-98 (6th Cir. 1990).

There is, in any event, disagreement as to whether comment after a defendant has testified at sentencing about his failure to do so during the guilt phase violates *Griffin. Compare Lesko v. Lehman*, 925 F.2d 1527, 1541-43 (3d Cir. 1991) ("[A] capital defendant does not completely waive his Griffin rights by testifying at the penalty phase solely on mitigating factors that are wholly collateral to the merits of the charges against him.") with *Tucker v. Francis*, 723 F.2d 1504., 1511-12 (11th Cir. 1984) ("It is not fundamentally unfair to comment on the appellant's silence during the culpability phase as juxtaposed with his exculpatory testimony during the sentencing phase.").

Thus, allowing the jurors to consider these statements was not contrary to, or did not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

Finally, the prosecutor stated, with regard to the petitioner's unsworn statement to the jury, that the prosecution had had forty-five witnesses who had taken the oath to tell the truth, but the petitioner "testified without taking an oath," so that "I couldn't cross-examine him. And you decide the value of his statement." Tr. 2800. Objections were overruled.

The court of appeals held that the prosecutor's statements went beyond the zone of permissive comment on a capital defendant's electing to address the jury in an unsworn statement. 1994 WL 50703 at *11. That court also concluded, however, that the "prosecutor's statements referring to appellant's unsworn statement for the most part conformed to the limitations" under Ohio law, so that the "comment about [the] inability to cross-examine was not prejudicial to appellant's right to a fair trial." *Id.* I agree that the prosecutor's comment on the unsworn quality of the statement and his inability to cross-examine the petitioner following the statement did not deprive the petitioner of his right to a fair trial.

Taken as a whole, even in light of those areas of the closing argument that were excessive or improper, the closing argument did not result in fundamental unfairness to the petitioner. The petitioner is not entitled to relief on this claim.

8. Lack of Notice re. Charge

The petitioner claims that his right to due process was violated when the indictment, which charged him with a separate count of aggravated burglary, failed to identify the felony that he allegedly intended to commit on entering the occupied structure.

The state courts held on direct appeal that this claim had been waived for failure to have raised it prior to trial, as required by Ohio R. Crim. P. 12(B)(2). *Frazier, supra*, 73 Ohio St. 3d at 332. The petitioner not having shown cause for and prejudice from the waiver, cannot obtain habeas relief on this claim.

In any event, this claim is without merit. The due process clause requires only fair notice of the charges. *In re Ruffalo*, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); *Watson v. Jago*, 558 F.2d 330, 338-39 (6th Cir. 1977). Such notice was given in this case. Read in the context of the other charges, it was clear that the murder of Tiffany was the felony connected to the burglary charge. The indictment suggested no other felony, and the state undertook to prove no other felony at trial.

Even if a reading of the burglary charge in the context of the other charges in the indictment failed to apprize the petitioner of the nature of the underlying felony, the burglary charge nonetheless met due process requirements. *See West v. Johnson*, 92 F.3d 1385, 1396 n.15 (5th Cir. 1996) (where indictment, alleging merely "burglary of a habitation" satisfied requirements of state law, habeas relief not warranted)

In his traverse, the petitioner claims that the intermediate appellate court failed to explain its reasons for rejecting this claim. According to the petitioner, such failure impairs this court's opportunity to review that court's ruling.

The Ohio Supreme Court explained its reasons for its rejection of this claim. That explanation provides an ample basis for this court's review of the claim. There is no merit to petitioner's conclusory assertion that the Supreme Court's explanation does not overcome the omission in the intermediate court's opinion.

In any event, the state court decision overruling this claim was neither contrary to nor an unreasonable application of Supreme Court precedent. The petitioner is not entitled to relief on this claim.

9. Failure to Merge Offenses

Petitioner claims the trial court was required to merge the aggravated burglary specification with the aggravated murder specification. The aggravated burglary, he argues, was incidental to the aggravated murder, and merged into the aggravated murder charge.

Rejecting this claim on petitioner's direct appeal, the Ohio Supreme Court stated:

> In *State v. Moss* (1982), 69 Ohio St. 2d 515, 23 Ohio Op. 3d 447, 433 N.E.2d 181, paragraph two of the syllabus, this court held, "Aggravated murder, as defined by R.C. 2903.01(B), is not an 'allied offense of similar import' to aggravated burglary, as defined by R.C. 2911.11(A)(1), for purposes of application of R.C. 2941.25(A)."
>
> The elements of aggravated burglary and aggravated murder do not correspond to such a degree that the commission of one results in the commission of the other. "In order to commit either the crime of aggravated burglary or aggravated murder, the other crime need not be committed . . . . 'The two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by definition be committed. Aggravated murder and aggravated burglary are never merely incidental to each other . . .'" *State v. Henderson (1988), 39 Ohio St. 3d 24, 28, 528 N.E.2d 1237, 1242.*
>
> As the crimes of aggravated burglary and aggravated murder are not allied offenses of similar import, appellant's arguments are without merit.

73 Ohio St. 3d at 342-43.

State courts, as the Supreme Court stated in *Mullaney v. Wilbur*, 421 U.S. 684, 691, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), "are the ultimate expositors of state law." Thus, "a state decision resting on an adequate foundation of state substantive law is immune from review in federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). Consequently, the Ohio Supreme Court's determination that the charge of burglary was properly made and proven forecloses a different result in this proceeding.

Petitioner argues that failure to have merged the aggravated burglary and aggravated murder charges prevented the jury from properly weighing the aggravating and mitigating circumstances at sentencing. In addition he contends that the death sentence would have been disproportionate and excessive had merger occurred.

In *West, supra,* a habeas petitioner similarly argued that his death sentence was not valid because it was based on a conviction for murder and burglary where the felony associated with the burglary had been the murder alone, rather than a separate theft or similar offense. Rejecting the claim, the court noted:

> The Texas Court of Criminal Appeals has several times upheld capital murder convictions on the basis of a burglary where the burglary was established by the murder of the victim following unlawful entry into his or her habitation. The evidence here is plainly sufficient to show burglary by [petitioner's] forced entry into the victim's room followed by his murder of her therein.

92 F.3d at 1397-98 (citations and footnote omitted).

Here the Ohio Supreme Court held as a matter of law that the burglary charge was sufficient, and no proof other than the murder was needed to convict the petitioner of the burglary. Ohio's similar interpretation of its law on this issue is as binding on this court as the Texas court's interpretation of that state's law was on the federal court in West.

10. Ohio R. Evid. 410

The petitioner, expressly waiving his right to have his lawyer present, contacted Cleveland Police Detective Svekric on November 14, 1991. This led to a meetings between the petitioner, Detective Svekric, Cleveland Police Lieutenant James, and Assistant Cuyahoga County Prosecutor McGinty, who later conducted the prosecution against the petitioner. The circumstances of the meetings and statements by the petitioner during those meetings were summarized by the Ohio Supreme Court in its opinion on petitioner's direct appeal:

> On November 14, 1991, appellant requested a meeting with Detective Svekric. Originally, Svekric told appellant he could not meet with him for a few days. After this discussion, Svekric notified Lieutenant James and Prosecutor McGinty of the conversation. Svekric was advised that he should go to the jail as appellant requested. The three men went out to the Medina County Sheriff's office to speak with appellant. Svekric and James met with appellant and read him his Miranda rights, which appellant voluntarily waived. Appellant insisted that he understood that he had the right to have an attorney present during the interview.
>
> Svekric and James informed appellant that they were not interested in the Medina (rape) case, that they were only interested in the murder of his former

stepdaughter. Appellant informed the detectives he had information about other murders involving the Hell's Angels. The detectives once again informed appellant that their sole purpose for being there was to discuss the Skiba murder with him. Appellant requested that the conversation be "off the record." The detectives informed him that this was not possible, that anything he said could be used against him in court. Appellant was asked a series of ten questions concerning Skiba. Appellant was then asked additional questions concerning the last day he worked that month and about the rental of a Honda automobile. Appellant responded that he had a reason for renting the car but that he was not going to say what at that time.

* * * *

Detectives then asked if appellant had an alibi for 5:05 a.m. on November 8, 1990. Appellant responded that he did not have an alibi for that time.

Appellant then began to question what the detectives could do for him. He stated that he did not want to go to trial in Cleveland and asked if they could get him "a flat time" if he pled guilty. The detectives informed appellant that the only thing they could do would be to talk with the prosecutor's office and the judge and explain whether or not he had cooperated with the police, but they were not in a position to make any decisions as to what he could plead or what the punishment would be.

Appellant then offered to plead guilty to murder or manslaughter and the impending rape charge if he could make a deal. The detectives repeated their previous statement that they had no authority to make

a deal. Appellant requested that the detectives bring the Cuyahoga County assistant prosecutor back with them, at which time he would tell everything he knew about the murder of his former stepdaughter. The detectives had appellant taken back to his cell while they conferred with McGinty.

The three men returned to the Medina County Sheriff's office. Appellant was brought from his cell and again read his Miranda rights, which he waived. When asked if he wanted to have an attorney present, appellant responded, "No." The detectives explained that he was entitled to have an attorney present and appellant responded that he did not want his attorneys to know that he was talking to the police.

The detectives informed appellant that the case against him was going to be presented to the grand jury and that he would more than likely be indicted for aggravated murder. Appellant again stated that he did not want to go to trial in Cleveland and again offered to plead to a lesser charge in the rape and murder if he could "work a deal for straight time."

At this time, James was called from the office. When he returned, he informed appellant that they knew of the medical clinic where he had his wrist sutured the morning of the murder. Appellant became reticent, although he continued to express an interest in entering into a plea bargain. The detectives remained firm in their statements that the most they could do was to talk to the prosecutor's office and the judge who would be assigned to the case and inform them that he had cooperated.

Svekric then asked, "Do you want to tell us exactly what happened on November 8th with Tiffany Skiba,

> yes or no?" Appellant responded that he would tell them what they wanted to know, but requested that his attorneys be present. At this time, questioning ceased and appellant's attorneys were contacted.

73 Ohio St. 3d at 334-36.

The petitioner claims that his statements during these meetings constituted plea discussions, and thus were inadmissible under Ohio R. Evid. 410. According to the petitioner, the state courts applied an amended version of the rule to allow his statements to be admitted. By doing so, he asserts, the state court violated the ban on ex post facto laws.

There is no merit to the petitioner's contention because the premise on which it is based—that his statements occurred in the context of plea negotiations—is invalid. The Ohio Supreme Court held on direct appeal that "regardless of which version of Evid. R. 410 . . . applied, "the November 14th interview "was simply not a plea discussion." 73 Ohio St. 3d at 336.

Whether the statements were made in the context of plea discussions was a finding of historical fact, and thus is binding on this court. *See Phillips v. Murphy*, 796 F.2d 1303, 1306 (1986) ("the State Court's finding that there were no plea negotiations is clearly one of historical fact subject to the § 2254(d) presumption.").

It is, therefore, immaterial which version of Rule 410 may have applicable when the petitioner's statements were admitted, because neither version was relevant to the admissibility of the statements.

In any event, even if the evidence came within one or the other versions of Rule 410, the state court's ruling an admissibility is not cognizable in this proceeding. *Estelle v. McGuire, supra.*

11. Ex Parte Contact by the Prosecutor With a Represented Defendant

The petitioner claims that Assistant Prosecutor McGinty violated Disciplinary Rule 7-104(A)(1) of Ohio's Code of Professional Responsibility when he met ex parte with the petitioner in the absence of petitioner's counsel. That provision states:

During the course of his representation of a client a lawyer shall not:

> (1) Communicate or cause to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The Ohio Supreme Court, noting that the petitioner had "distinctly waived" his right to counsel, 73 Ohio St. 3d at 342, held that McGinty had not violated DR 7-104(A)(1). This interpretation of state law, which is binding on this court, precludes habeas relief. *Wainwright v. Sykes, supra.*

Petitioner, citing cases involving federal prosecutions, claims that McGinty's ex parte contact violated the Fifth and Sixth Amendment. It does not appear that he sought relief on

this basis in the state courts. In both the intermediate appellate court, 1994 WL 50703, *8-9, or the Ohio Supreme Court, 73 Ohio St. 3d at 342, petitioner's presentation of this claim was based entirely on the Ohio Code of Professional Responsibility. He has, accordingly, waived any constitutional basis for his claim, absent a showing of cause and prejudice. *Wainwright*, 433 U.S. at 86.

Even if the petitioner has not waived this challenge by not having presented it to the state courts, his claim is without merit because it has no constitutional basis. The principal case on which he relies, *United States v. Hammad*, 858 F.2d 834, 841 (2nd Cir.1988), n4 expressly enunciated a non-constitutional doctrine based on a federal court's inherent supervisory powers over federal prosecutions. Decisions based on the supervisory power are not relevant in a habeas corpus proceeding. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) ("not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'") (*citing Lisenba v. California*, 314 U.S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280 (1941)); *DeLisle v. Rivers*, 161 F.3d 370, 388 (6th Cir. 1998) ("We have no [supervisory] power . . . 'to intervene to protect the integrity of the [state court] system'") (citing *Frazier v. Heebe*, 482 U.S. 641, 647 n.7, 96 L. Ed. 2d 557, 107 S. Ct. 2607 (1987)).

n4 Petitioner cites *United States v. Hammad*, 846 F.2d 854 (2d Cir. 1988), in support of his claim. That initial version of the court's opinion was superseded by the court's revised opinion in *United States v. Hammad*, 858 F.2d 834 (2nd Cir. 1988).

12. Admission of Photographic Evidence

At petitioner's trial the court admitted two sets of photographs. One set consisted of twelve photos of Tiffany's body at the crime scene. The coroner took the other set of fourteen photos during the autopsy. The petitioner contends that introduction of the autopsy photographs was excessive, repetitive, and cumulative, and their quantity and gruesome character deprived him of his rights to a fundamentally fair trial and an impartial jury. n5

> n5 Though not originally submitted as part of the record, the respondent has provided the photographs pursuant to court order.

The Ohio Supreme Court held that the photographs "were not repetitive or cumulative . . . [and] were introduced during the coroner's testimony to illustrate the testimony." 73 Ohio St. 3d at 333. The court pointed out that "each photograph presented a different perspective of the victim . . . [and] were used to illustrate the twenty-one stab wounds and other cuts, many of which were defensive in nature."

To prevail on his claim that admission of the autopsy photos violated his federal constitutional rights, the petitioner must show that the state court's evidentiary ruling "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). As stated by the Sixth Circuit in *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir.1989), "the ultimate question is whether the claimed error was so egregious as to have nullified the legitimacy of the properly admitted substantive evidence." *Accord, Jamison v. Collins*, 100 F. Supp. 2d 647, 702 (S.D. Ohio 2000).

In *Mason v. Mitchell*, 95 F. Supp. 2d 744, 778 (N.D. Ohio 2000), the court, upholding admission of eight crime scene and autopsy photographs over a habeas corpus petitioner's due process objection, stated:

> The trial court has discretion to admit a relevant photograph unless it is so gruesome or inflammatory that its prejudicial impact substantially outweighs its probative value. The eight 3-1/4 x 5" photographs challenged by Petitioner in this case were relevant not only to show how the victim died, but also to corroborate the testimony of the law enforcement personnel who testified, to illustrate the officers's testimony which described the crime scene and the location and condition of the victim's body, to show the nature and extent of the injuries to the victim, and to assist the jury in understanding the testimony of the medical examiner. These are all legitimate purposes for which victim photographs are routinely admitted. The trial court did not abuse its discretion by admitting the crime scene and autopsy photographs.

In *Woods v. Johnson*, 75 F.3d 1017, 1039 (5th Cir.1996), the court, likewise overruling a due process challenge to eight crime scene photos, stated:

> The photographs were introduced during the testimony of the police officers who discovered the body and arrested [the petitioner] at the apartment. In addition to identifying the deceased, the photographs served to illustrate and make more understandable the officers' testimony which described the apartment and its condition, and the location and condition of the deceased's body and the nature and extent of the injuries to the deceased. These are certainly legitimate purposes. [The petitioner] does not contend that any of the photographs were unrepresentative or

> misleading respecting either the condition of the victim or the crime scene. Moreover, he in essence does not dispute that introduction of three or "even" four such photographs would have been permissible, but contends that eight was, in effect, overkill. However, as the district court observed, each of the photographs, with the sole exception of numbers 3 and 4, shows injuries and details that the others do not. It is entirely clear that photographic evidence of the kind introduced was entirely proper, and that to the extent more was used than appropriate this did not go so far as to render Woods' trial fundamentally unfair.

In this case, the petitioner's principal argument is that admission of a total of twenty-five photographs of the victim was unfairly and prejudicially cumulative. Admission of so many photos did not, however, necessarily deprive the petitioner of a fundamentally fair trial. As stated in *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997):

> admission of "gruesome" photos of the decedent in a murder case does not justify collateral relief, even when the evidence is cumulative and likely designed more to inflame the jury than to supply an essential underpinning of the prosecution's case.
>
> Photographs of the decedent's body are relevant. They tend to show that the crime charged by the indictment took place. Graphic depictions of multiple bullet wounds also may be relevant: they can (and here did) support the prosecution's other evidence about how the crime occurred . . . . Although these facts were adduced in a more sedate fashion through the testimony of a pathologist, no rule of law, and certainly no rule of constitutional law, limits the prosecutor to one piece of evidence in support of each

> element of the offense. This is so even when the element is uncontested—indeed, even when the defendant offers to admit the element . . . .

The investigators' testimony about the crime scene photos accompanied their testimony about the conditions in Tiffany's bedroom, including evidence of her efforts to resist her assailant. That evidence, in turn, was relevant to testimony about the petitioner's physical appearance shortly after the murder, treatment of his wound, and his dubious explanation about how he was injured. Admission of the coroner's photos also illustrated his testimony that no single wound was fatal.

The properly admitted evidence pointed clearly to the petitioner as Tiffany's killer. That evidence included extensive proof of petitioner's motive, the persuasive circumstantial evidence of the bootprint, his bruised physical appearance shortly after the murder, evidence of Tiffany's attempts to defend herself, the implausibility of petitioner's account of the wound to his wrist, and indicia of guilt contained in his statements to the officers in the Medina County jail.

Though permissible under a due process standard, introduction of twenty-five photographs of Tiffany's butchered body nonetheless manifested the prosecutors' pervasive instinct for inappropriate excess observable elsewhere in the the conduct of this case—most noticeably in their initial opening and final closing arguments. That inappropriate and unprofessional excess does not, however, nullify "the legitimacy of the properly admitted substantive evidence." *Lundy*, 888 F.2d at 473; *see also Garrett v. Parke*, 892 F.2d 79, 1989 WL 153553, *1 (6th Cir.) (Unpublished Disposition) (admission of thirty-three or thirty-four photos of victim and victim's bloody clothes did not cause trial to be fundamentally unfair).

13. Jury Instructions re. Foreseeability

Petitioner claims that the trial court improperly used a negligence standard to describe foreseeability in its instructions.

The challenged instruction stated:

> Cause is an act which in the normal and continuous sequence of events produces the death and without which the death would not have occurred, when the death is the natural and foreseeable result of the act.
>
> A death is the result of an act which it [sic] is produced directly the act in a natural and continuous sequence and would not have occurred without the act.
>
> Result occurs when the death is naturally and foreseeably caused by the act.
>
> The causal responsibility of the defendant for an unlawful act is not limited to its immediate or most obvious result. He is responsible for the natural, logical and foreseeable results that follow in the ordinary course of events from an unlawful act.
>
> The test[ ] for foreseeability is not whether the defendant should have foreseen the injury in its precise form. The test is whether a reasonably prudent person, in the light of all the circumstances, would have anticipated the death was likely to result to anyone from the performance of the unlawful act.

The Ohio Supreme Court noted that this instruction had been criticized by the intermediate appellate court that

affirmed the petitioner's conviction. 73 Ohio St. 3d at 331. The Supreme Court also noted, however, that the instruction had been held not to have allowed the jury to find a defendant guilty on the basis of simple negligence where the jury otherwise was informed that it had to determine that the defendant acted with intent to kill. *Id.*

In this case, the trial court expressly gave that directive to the jury. Elsewhere in its instructions, the court told the jury:

> As previously stated, before you can find the defendant guilty of aggravated murder in the first count, you must find beyond a reasonable doubt that Tiffany Skiba's death was purposely and with specific intent caused by the defendant in accordance with these instructions of law herein given while the defendant was committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated burglary.

Moreover, as pointed out by the Ohio Supreme Court:

> The trial judge elaborated on the instructions and provided a thorough explanation of causation both before and after the OJI portion of the instructions. The trial judge included the instruction that purpose can be inferred from the use of a deadly weapon. Additionally, . . . , the state also made it clear in closing arguments that in order to return a verdict of guilty, the jury had to determine that appellant acted with the intent to kill.

73 Ohio St. 3d at 331.

The fact that an instruction is improper under state law is not a basis for habeas relief. *Estelle v. McGuire*, 502 U.S.

62, 71, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991). Instead, the Supreme Court stated in Estelle:

> The only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. In addition, in reviewing an ambiguous instruction such as the one at issue here, we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. And we also bear in mind our previous admonition that we "have defined the category of infractions that violate 'fundamental fairness' very narrowly."

502 U.S. at 72-73 (citations and footnote omitted).

The state courts concluded that the challenged instruction was not improper. In any event, even if that portion of the instruction had been erroneous, it is clear that the overall charge imposed the obligation to find that the defendant specifically intended to kill Tiffany.

14. Reasonable Doubt Instruction

The petitioner claims that the court's instruction on reasonable doubt allowed him to be convicted on the basis of proof that did not meet that standard. The instruction, taken from O.R.C. § 2901.05(D), stated:

> Reasonable doubt is present when you, the jurors, after you have carefully considered and compared all the evidence, cannot say that you are firmly

> convinced of the truth of the charge. It is doubt based on reason and common sense. Reasonable doubt is not mere doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.
>
> Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

The Sixth Circuit upheld Ohio's reasonable doubt charge in *Thomas v. Arn*, 704 F.2d 865 (6th Cir. 1982). "When read as a whole," the court stated, "Ohio's statutory definitions of reasonable doubt, . . . , do not offend due process or any other federally guaranteed constitutional right." *Id.* at 869. *Accord, Scott v. Mitchell*, 209 F.3d 854, 884 (6th Cir. 2000).

15. Sufficiency of the Evidence

The petitioner claims the evidence was insufficient to sustain his conviction under *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). In assessing this claim, all reasonable inferences must be drawn in favor of the state and conflicting inferences must be presumed to have been resolved in the state's favor. *Id.* at 326.

From a reading of the trial record, I conclude that the Ohio Supreme Court accurately summarized the evidence against the petitioner:

> Appellant had a powerful motive to kill Skiba. Skiba had accused appellant of sexually abusing and raping her. Appellant was the putative father of Skiba's two-year-old son. Appellant's rape trial and paternity blood test were scheduled to occur within days of the murder. Skiba played a role in the divorce between

appellant and Susan Bednarski. Appellant sent Skiba a Halloween card requesting that she contact him, and he was seen on a number of occasions in and around her neighborhood and following her school bus.

Appellant was linked to the scene by bootprints in the neighbor's garden. He was aware of the family's daily routine and the layout of the house. The method of entry was identical to that used by his former brother-in-law when they were locked out of the house.

Appellant's behavior immediately before and after the murder was unusual. Although he owned at least two operable vehicles, he rented a car two days before the murder. He received medical attention for a cut on his wrist on the morning of the murder. The attending physician testified that the cut was consistent with a stab wound. Appellant requested the help of friends in moving his car and in retrieving items from his apartment. He did not return to his apartment the weekend following the murder.

The evidence suggests that the murderer knew the family's schedule, was familiar with the layout of the house, including uniquely located light switches, knew how and where to enter the home, knew where to find the victim, acted quickly to avoid detection, and did not steal or otherwise disturb anything else in the home as would be common for a burglarer. Additionally, appellant's statements to the police and his offer to plead guilty to Skiba's murder and rape in return for a definite term sentence further support an inference of appellant's guilt.

Id. at 340.

The petitioner claims that this evidence was insufficient to sustain a conviction in light of the fact that the bootprint could have been made by any one of 40,000 pairs of boots with that characteristic feature. In addition, he points out that the wound in his arm was consistent with his explanation that he had injured himself while working on his vehicle on the day of the murder. He also argues that his conviction was tainted by the admission of improper evidence, without which, he asserts, a conviction could not have been obtained.

As discussed elsewhere, the evidence petitioner challenges was admissible. The jury rejected his contention about how he was wounded. The jury's conclusion that the petitioner's boot left the print cannot be disregarded by this court, which must, as noted, draw all inferences favorable to the state. Petitioner's motive and his opportunity to commit the crime are indisputable. In sum, there was sufficient evidence to persuade a rational trier of fact of petitioner's guilt beyond a reasonable doubt.

16. Constitutionality of Ohio's Death Penalty Scheme

Petitioner claims that Ohio's death penalty scheme violates the Sixth, Eighth, and Fourteenth Amendments. His recitation is, as the respondent notes, "somewhat difficult to dissect into discrete claims of unconstitutionality." Several arguments may, however, be discerned, and will be discussed in the sequence in which they are presented in the petition.

a. Least Restrictive Punishment

Petitioner claims that capital punishment is unconstitutional because it is not the least restrictive means of achieving its purposes. Restraint, the petitioner asserts, can accomplish the objectives of deterrence and incapacitation. There is, however, no constitutional requirement that the legislature select the least severe penalty

possible, as the Supreme Court made clear in *Gregg v. Georgia*, 428 U.S. 153, 175, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) ("We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.").

In any event, the Court found studies concerning the deterrent effect of capital punishment to be inconclusive, *id.* at 185, and thus an insufficient basis on which to disregard a legislative determination that capital punishment is an appropriate sanction. *Id.* at 186.

b. Excessive Prosecutorial Discretion

The petitioner claims that excessive discretion is given to prosecutors to determine when to seek the death penalty. The Supreme Court rejected this argument in Gregg:

> Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.

Id. at 225 (White, J.). *Accord, Zuern v. Tate*, 101 F. Supp. 2d 948, 1002 (S.D. Ohio 2000).

c. Determination of Guilt and Punishment by the Same Trier of Fact

The petitioner claims that allowing the same jury to determine guilt and punishment violated his right to effective assistance of counsel and a fair trial before an impartial jury.

With regard to his right to counsel claim, the petitioner asserts that, having presented an unsuccessful defense at the guilt phase, he and his attorney were unable to present themselves as credible during the penalty phase. His right to effective assistance of counsel was also impaired, according to the petitioner, by the need to conduct voir dire on the subject of the death penalty, thereby suggesting in advance of trial that his case was so weak that his primary concern was with the possibility of death. Finally, the petitioner asserts that his inability to control the distribution of the results of any pretrial mental examination to which he might be entitled has an incapacitating effect on his lawyer's ability to represent him effectively.

Petitioner argues that he was deprived of his right to an impartial jury when the same jurors adjudicated his sentence after having determined his guilt. In effect, he contends, the jury's ability impartially to determine sentence was irredeemably foreclosed by its participation in, deliberations during, and verdict following the guilt phase.

There is no support in the case law for the petitioner's contention that either his right to counsel or to a fair trial is denied when the same jury hears both the guilt and penalty phases of the trial. Although the Supreme Court has not considered the specific challenges asserted by the petitioner, it has consistently approved the use of the same jury to determine both guilt and punishment. *See generally Lockhart v. McCree*, 476 U.S. 162, 180, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986); *see also Romano v. Oklahoma*, 512 U.S. 1, 129 L. Ed. 2d 1, 114 S. Ct. 2004 (1994) (assuming the validity of such proceeding); *Buchanan v. Kentucky*, 483 U.S. 402, 417, 97 L. Ed. 2d 336, 107 S. Ct. 2906 (1987) ("The Court further explained in McCree that the State's interest in having a single jury decide all the issues in a capital trial was proper."). Absent support more persuasive than the

petitioner's conclusory arguments about the prejudice resulting from having the same jury determine issues of guilt and sentence, he has not shown that this procedure rendered the sentencing proceeding and its outcome fundamentally unfair.

The petitioner also complains about compelled disclosure to the prosecutor and jury of the results of any mental examination. This procedure has been held not to violate constitutional norms. *Byrd v. Collins*, 209 F.3d 486, 539 (6th Cir. 2000); *Scott v. Anderson*, 58 F. Supp. 2d 767, 797 (N.D. Ohio 1998), *rev'd in part, aff'd in part on other grounds sub nom. Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000) ("because the defendant is given an option of requesting a pre-sentence report, and can choose to develop background information on his own, there appears nothing constitutionally infirm about the state providing the option, even if it carries with it some attendant risks or requires some level of strategic choice.")

The rationale underlying the Supreme Court's decision in *Williams v. Florida*, 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970), is applicable here. In that case, the Court held that the right to a fair trial was not violated when the state conditioned the defendant's right to obtain discovery on disclosure by him of information concerning any alibi that he might offer.

The disclosure required by O.R.C. § 2929.03(D)(1) is similar. The statute provides that a defendant in a capital case may alone request a mental examination for use at the sentencing phase. If he does so, the report shall be considered by the jury. As in *Williams*, 399 U.S. at 82, this procedure enhances the search for truth and does not render the proceedings fundamentally unfair. *See also United States v. Lee*, 90 F. Supp. 2d 1324 (D. N.M. 2000) (due process, self-incrimination, and confrontation rights not violated by

reciprocal disclosure requirements of Classified Information Procedures Act). Nor, in my view, is the right to effective assistance of counsel thereby impaired. The risk that the examination will produce unfavorable results is simply one factor that counsel must take into consideration in determining how to approach the sentencing phase.

d. Use of the Term "Outweigh" re. Aggravating and Mitigating Factors

Petitioner claims that the language of Ohio's death penalty provision, that "the aggravating circumstances . . . outweigh the mitigating factors," diminishes the standard of proof at sentencing. This argument disregards the trial court's express instruction that the standard of proof was beyond a reasonable doubt.

The trial judge charged the jury that "the State of Ohio has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances that the defendant was found guilty of committing are sufficient to outweigh any factors in mitigation of the imposition of the sentence of death." According to the petitioner's interpretation, use of the term "outweigh" introduced the risk that the jurors might find only by a preponderance of the evidence that aggravating circumstances were greater than mitigating circumstances.

Other challenges to this language have been rejected. *See Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000) ("instruction pertains only to the weighing process, and not to the existence of individual mitigating or aggravating factors."); *Cooks v. Ward*, 165 F.3d 1283, 1291 (10th Cir. 1998) (this language does not mandate imposition of death penalty); *Davis v. Executive Director of Dept. of Corrections*, 100 F.3d 750, 776 (10th Cir. 1996) (instruction did not render petitioner's trial fundamentally unfair).

The court's instruction made clear that whether aggravating circumstances outweighed mitigating factors had to be determined by proof beyond a reasonable doubt. There was no error in this instruction. In any event, as with his complaints about other jury instructions, the petitioner has failed to show how his right to a fundamentally fair trial was denied by the challenged instruction, as underscored by the duty to make that finding on the basis of the reasonable doubt standard.

e. Inducement to Plead Guilty

The petitioner claims that defendants indicted on capital charges are unconstitutionally induced to plead guilty. Improper coercive pressure arises, according to the petitioner, from the fact that an indicted defendant is aware that, if he proceeds to trial, his sentence will be determined by jurors who will discount his credibility, having already found him guilt of murder. This risk is enhanced, he asserts, due to the death qualification of the jurors.

This claim, though not referencing Ohio R. Crim. P. 11(C)(3), appears to derive from that provision. Rule 11(C)(3) permits the trial judge, if a defendant offers a plea of guilty, to dismiss the death penalty specifications "in the interest of justice."

In support of his claim, the petitioner cites *United States v. Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968). In that case the Supreme Court held that a capital sentencing scheme "needlessly penalized" the right to plead not guilty when to do so would eliminate all risk of a death sentence. *Id* at 582.

The procedural structure in this case differs from that at issue in Jackson. Here, there is no guarantee that a guilty plea will avoid all risk of a death sentence. Thus, the desire to

eliminate that risk entirely, which the Supreme Court held could penalize the right to proceed to trial, is not present here. Ohio, accordingly, imposes no burden on the exercise of the right to trial by jury. *Dennis v. Mitchell, 68 F. Supp. 2d 863, 903 (N.D. Ohio 1999).*

To the extent that the petitioner contends that he was entitled to be sentenced before a separate jury than that which found him guilty, his claim fails for want of legal support. Juries in some states, see *Sam v. State*, 1974 OK CR 101, 523 P.2d 1146 (Okla. 1974) (assault and battery); *Robinson v. State*, 705 S.W.2d 293 (Tex. Crim. App. 1986) (burglary), participate in both the guilt and sentencing phases in non-capital cases. Petitioner has not cited any case standing for the proposition that such participation violates the federal Constitution. To the extent that authority exists, it supports the constitutionality of sentencing by the same jury following a guilty verdict. *See Thomas v. Taylor*, 170 F.3d 466, 470 (4th Cir. 1999) (no constitutional violation where juvenile tried as an adult was sentenced to death by the guilt-phase jury) (dictum).

f. Insufficient Data to Conduct Proportionality Review

The petitioner contends that insufficient data about the reasons for life sentences is gathered in capital cases which result in a sentence other than death. Without such data, the petitioner contends, Ohio's reviewing courts cannot conduct an adequate proportionality review.

This claims fails because the federal Constitution does not require a proportionality review. *See, e.g., Pulley v. Harris*, 465 U.S. 37, 43-44, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984); *Coe v. Bell*, 161 F.3d 320, 351-52 (6th Cir. 1998) (statute providing for proportionality review did not create a

liberty interest). Thus, Ohio can choose to implement whatever procedures it desires with regard to such review.

To the extent that the petitioner is contending the state and its courts have not complied with Ohio law, such claim is not cognizable in this proceeding. *See Pulley v. Harris*, 465 U.S. 37, 41, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984).

The Ohio Supreme Court stated, "After conducting a proportionality review and comparing appellant's case with similar cases, we determine that the penalty imposed is neither excessive nor disproportionate." *Frazier*, 73 Ohio St. 3d at 345. As noted in *Roach v. Angelone*, 176 F.3d 210, 217 (4th Cir. 1999). a federal court cannot "'look behind' the review conducted by the [sate] Supreme Court . . . and endeavor to ascertain what that court 'really did' . . . [because] this would be a virtually impossible task and the Constitution does not require . . . such a speculative undertaking."

g. Preclusion of Mercy

The petitioner claims that the Ohio death penalty scheme precludes mercy as an option, either in the absence of mitigation or when aggravating circumstances outweigh mitigating factors. In making this argument, he points neither to a statutory provision nor judicial decision that forecloses mercy on the jury's part. There being no legal basis for his argument, it is without merit.

In essence, the petitioner appears to be complaining that Ohio law does not require an instruction to the jurors that, if they elect, and despite the evidence to the contrary, they can be merciful and impose a life sentence on that basis alone. No court, even in a capital context, is required to invite jury nullification. Thus, in his concurring opinion in *Jurek v. Texas*, 428 U.S. 262, 279, 49 L. Ed. 2d 929, 96 S. Ct. 2950

(1976), Justice White noted that the Texas capital statute "does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *See also Sumner v. Shuman*, 483 U.S. 66, 85 n.13, 97 L. Ed. 2d 56, 107 S. Ct. 2716 (1987) ("guided-discretion statutes . . . , provide for bifurcated trials in capital cases to avoid nullification problems."); *Lockhart v. McCree*, 476 U.S. 162, 172, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986) ("so-called 'nullifiers,' or individuals who, because of their deep-seated opposition to the death penalty, would be unable to decide a capital defendant's guilt or innocence fairly and impartially . . . may properly be excluded from the guilt-phase jury"); *Mapes v. Coyle*, 171 F.3d 408, 416 (6th Cir. 1999) ("there is no merit whatsoever to [the] claimed entitlement to a 'merciful discretion' instruction, in light of the likely tendency of such an instruction to lead to arbitrary differences in whom is selected to be sentenced to death.").

h. No Requirement That Trial Court Find Death to be the Only Appropriate Penalty

The petitioner claims that the trial judge is not required to make an express finding that the death penalty, if imposed, is appropriate. He points out that Ohio appellate courts must, under O.R.C. § 2929.05, determine that death is the only appropriate penalty.

Because the trial judge need not make a finding that the penalty is appropriate in the particular case, the petitioner argues, reviewing courts must speculate about whether the trial judge dealt with this constitutionally mandated issue.

The petitioner's argument ignores the fact that under Ohio law the trial judge independently determines whether to accept the jury's death verdict. When the trial court does so, it implicitly determines that death, rather than a life sentence,

is appropriate in the particular case. Thus, though Ohio law may not expressly direct the trial judge to make a specific finding about the suitability of a death sentence, its procedures compel such determination on the judge's part.

State court adjudication of this claim, moreover, did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

i. Failure to Require Premeditation, Etc.

Section 2929.02(D) of the Ohio Revised Code requires a finding that the defendant be "found specifically to have intended to cause the death of another." The petitioner claims that the failure of the Ohio legislature to define "specific intent" in this provision or elsewhere improperly exposes persons who act without premeditation and deliberation, or prior calculation and design, to the death penalty.

The flaw in the petitioner's argument is in its premise: namely, that premeditation and deliberation or prior calculation and design are prerequisites to a valid death sentence. This is not so, as the Supreme Court pointed out in *Tison v. Arizona*, 481 U.S. 137, 158, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987) ("major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the . . . culpability requirement.").

j. Standard of Proof

The petitioner claims that the standard of proof should be "beyond all doubt," rather than the conventional "beyond a reasonable doubt." This claim has been rejected in this district. *Morales v. Coyle*, 98 F. Supp. 2d 849, 883 (N.D. Ohio 2000).

The state court's rejection of the claim, moreover, did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

k. Adequacy of Aggravating Circumstance

The petitioner claims that the same factor that results in guilt—felony murder—was also the aggravating circumstance that resulted in his death sentence. As pointed out by the Sixth Circuit in *Scott v. Mitchell*, 209 F.3d 854, 884-85 (6th Cir.2000), this claim is without merit in light of the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988):

> Even if . . . the same act was the basis of [the] conviction and aggravating circumstance, this alone would not justify habeas relief. [In] *Lowenfield v. Phelps*, 484 U.S. 231, 244-46, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)[,] . . . the Supreme Court instructed that aggravating circumstances are not ends unto themselves, but simply one means by which a state may perform the narrowing function. *See id.* at 244, 108 S. Ct. 546. Lowenfield upheld the Texas death-penalty scheme, in which the narrowing function was performed by the legislature when it circumscribed the range of offenses eligible for the death penalty. *See id.* at 245-46, 108 S. Ct. 546. "The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." *Id.* at 246, 108 S. Ct. 546. Similarly, the Ohio Legislature

> "narrowed the class of felony murders subject to the death penalty by excluding those who commit [murder in the course of an] arson, robbery, burglary or escape, unless they are charged with a different aggravating circumstance." *State v. Buell*, 22 Ohio St. 3d 124, 489 N.E.2d 795, 807 (1986); *see also* Ohio Rev.Code § 2929.04(A) (1996) ("Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment . . . and proved beyond a reasonable doubt:"). [The petitioner] fell within the narrowed category of death-eligible felony murderers because he committed or attempted to commit aggravated robbery. *See* Ohio Rev. Code § 2929.04(A)(7) (1996).

l. Differential Treatment of Felony Murder and Premeditated Murder

The petitioner claims that the Ohio death penalty scheme treats felony murders more harshly than premeditated murders, and thus is unconstitutional. The basis for this argument appears to be the fact that felony murder is an aggravating circumstance, while premeditation is not such a circumstance.

To the extent that this claim is simply a reformulation of petitioner's earlier claim that his sentence is unconstitutional because the aggravating circumstance was also an element of the crime of felony murder, it is without merit for the reasons stated in the foregoing subsection.

If the petitioner is complaining that treatment of felony murder and persons convicted of that offense fails to narrow the class of homicides that can result in a death sentence, I disagree. Section 2929.04(A)(7) of the Ohio Revised Code limits capital felony murder to killings occurring during the commission of aggravated burglary, aggravated robbery, and

aggravated arson, with the defendant being shown either to have been a principal in those offenses or having committed the murder by prior calculation and design.

Petitioner presents this claim without analysis, argument, or citation to authority. There is no merit to this claim, the adjudication of which did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

m. Failure to Require State to Prove Absence of Mitigation

The petitioner asserts in a single sentence that Ohio's death penalty statute unconstitutionally relieves the state of the obligation of proving an absence of mitigating factors. Because the state constitutionally can impose the burden of proof on the defendant to prove mitigation, *Walton v. Arizona*, 497 U.S. 639, 650, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), the state properly can be relieved of any obligation to prove the absence of mitigating factors.

n. Vagueness of the Statutory Scheme

Likewise, the petitioner asserts in a single sentence that Ohio's statutory scheme is impermissibly vague. To the extent that this complaint is directed at the felony murder aspect of the statute, it is without merit. *Dennis v. Mitchell*, 68 F. Supp. 2d 863, 903 (N.D. Ohio 1999).

Otherwise, the petitioner has failed to show that the adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

o. Ensuring Proper Weighing and Consideration of Aggravating and Mitigating Circumstances

The petitioner claims that Ohio's death penalty statutes have impermissibly devalued the importance of mitigation because no method exists to ensure that proper "weighing and consideration" is accomplished. Petitioner's contention is not supported by citation to case law or other authority, and is unaccompanied by analysis. He has, accordingly, failed to show that the adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d).

p. Instruction Not to be Affected by Sympathy or Mercy

The trial court charged the jurors during the guilt phase that they "must not permit sympathy or bias, prejudice or favoritism for either side to affect your judgments." Tr. 2678. No similar charge was given prior to the sentencing phase. The anti-sympathy charge is an entirely proper charge, and one which benefits the defendant.

Neither charge referred to mercy. Thus, petitioner's claim that the jury was instructed that not to let "mercy enter into its determination" has no factual basis in the record. In any event, even if the jurors had been so charged, his claim is without merit for the reasons expressed in subsection g, *supra*.

17. Cumulative Error

Petitioner claims that his conviction and sentence are invalid due to cumulative error. Having found no substantial

error in the proceedings in the state courts, there can be no cumulative error of sufficient magnitude to entitle the petitioner to habeas corpus relief.

18. Failure of State Appellate Court to Articulate Reasons for Finding Aggravating Circumstances Outweighed Mitigating Circumstances

The petitioner contends that the intermediate appellate court failed to comply with the mandate of O.R.C. § 2929.05(A), which requires independent review of death sentences. The Ohio Supreme Court has interpreted this requirement as imposing on the reviewing courts a duty to "articulate the reasons why the aggravating circumstances outweigh the mitigating factors." *State v. Maurer*, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984) (Syllabus P 4).

The petitioner claims that the intermediate appellate court simply expressed itself in conclusory fashion, without giving its reasons as required by Ohio law. The Ohio Supreme Court held, however, that the intermediate court had complied with § 2929.05(A) in the text of its opinion, and that, therefore, the statutory command had been satisfied. *Frazier*, 73 Ohio St. 3d at 343. This determination of state law is binding on this court. *Pulley v. Harris*, 465 U.S. 37, 41, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984).

Even if the court of appeals erred, and failed to comply with the statutory command, such failure was not prejudicial. The Ohio Supreme Court undertook its own independent review and weighing of the aggravating and mitigating factors, and concluded that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt.

19. Ineffectiveness of Counsel: Mitigation Phase

The only evidence offered in mitigation was a two sentence unsworn statement by the petitioner to the jury. According to the petitioner, his trial counsel provided ineffective assistance of counsel by not calling a retained mitigation specialist as a mitigation witness or using any of the information she had obtained on his behalf.

To obtain relief, petitioner must show both that his counsel's performance "fell below an objective standard of reasonableness" and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel are presumed to have been competent, and the petitioner has the burden of overcoming this presumption. *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984); *United States v. Fortson*, 194 F.3d 730, 736 (6th Cir. 1999). In applying Strickland, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689.

As the Sixth Circuit noted in *McQueen v. Scroggy*, 99 F.3d 1302, 1313 (6th Cir. 1996), "in certain circumstances, failing to call appropriate mitigation witnesses can amount to ineffective assistance of counsel. Specifically, this is true where the [mitigation] witnesses had evidence to offer and where it was not a reasonable tactical decision to refuse to call them." Certainly, as the court also noted in McQueen, the claim that "failure to call . . . family witnesses was ineffective assistance of counsel has an intuitive appeal, ..." *Id.* But, as the court's opinion in McQueen also makes clear, the an informed decision not to call family members to testify about a defendant's childhood and upbringing can in some instances be sensible and appropriate. *Id.* at 1314; *see also Mason v. Mitchell*, 95 F.

Supp. 2d 744, 777 (N.D. Ohio 2000) (risk of adverse impact from introduction of mitigation evidence and resultant cross-examination outweighed potential benefits).

Petitioner states that information about his background, childhood, and mental status was available and should have been introduced in mitigation. This information related to petitioner's: 1) abandonment by his parents shortly after his birth; 2) having been reared by his sister until being forced from her home in his early teens; 3) living subsequently with his mother, who had abandoned him years before; and 4) suffering a head injury that adversely affected his ability to control his behavior.

The petitioner, aside from alluding in a conclusory fashion to the existence of potentially mitigating evidence, has presented no evidence in this or any other proceeding to support his contentions about the mitigating influence of any possible evidence about his family history and background. Nor does he assert that his lawyers failed to investigate possible sources of mitigation evidence, or, that if they did so, they erroneously elected to forego using it.

Petitioner had the burden of developing the record in state court. *Mitchell v. Rees*, 114 F.3d 571, 578 (6th Cir. 1997). Neither there nor here has the petitioner undertaken to present evidence as to, *inter alia*: 1) what evidence was available and would have been admissible on those subjects; 2) efforts by him or others to call such evidence to his lawyers' attention (or, in the alternative, that his lawyers were unaware of such evidence due to an inadequate investigation or other inappropriate inattentiveness to petitioner's case); or 3) the constitutional unsoundness of a decision on his lawyers' part, to the extent they were aware of such evidence, not to use such evidence.

Petitioner has, accordingly, failed to meet his burden of showing that, with regard to evidence about his family history and background, that his lawyers provided constitutionally inadequate representation. There is no basis in any of the records before this court for concluding that the performance of petitioner's counsel was constitutionally defective with regard to the failure to introduce evidence concerning the petitioner's family background and circumstances. Likewise, the petitioner has not shown how he was prejudiced by the absence of such evidence.

In response to petitioner's claim of ineffective assistance of counsel with regard to his contention that he had suffered a "disabling head injury . . . that affected his ability to properly control his behavior," the court of appeals found:

> From the record, it can reasonably be concluded trial counsel were appraised of the purported brain injury from their review of medical records; however, as a matter of trial strategy counsel deemed this avenue of defense unworthy of further pursuit. This conclusion is reinforced by three factors: 1) counsel's argument to the trial court that a psychologist would be used merely to interpret the mitigation expert's findings; 2) counsel's filing of the motion requesting a limitation on references to mitigation factors to only those upon which appellant ultimately relied; and 3) the thorough and professional manner in which counsel conducted appellant's defense during both the guilt and the penalty phase of appellant's trial.

State v. Fraizer, 1997 WL 764810, *6 (Ohio App. 8 Dist.).

Appellate court factual findings are binding on this court. *Sumner v. Mata*, 449 U.S. 539, 545-46, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1981). Thus, the findings that petitioner's trial counsel were appraised of his purported brain injury, see

Doyle v. Dugger, 922 F.2d 646, 650-51 (11th Cir. 1991) (finding that counsel sought advice of medical experts binding on federal court), and deemed that "avenue of defense unworthy of further pursuit" are binding on this court. *Berryman v. Morton*, 100 F.3d 1089, 1095 (3rd Cir. 1996) (finding re. strategy binding); *Haley v. Armontrout*, 924 F.2d 735, 740 (8th Cir. 1991) (finding that counsel made a strategic decision not to call witnesses binding).

It is apparent, therefore, that petitioner's trial counsel chose not to develop the record further with regard to the effect of his head injury, and that they did so as a matter of trial strategy. Petitioner has not shown that this strategic decision was deficient, or that it caused him prejudice. n6

> n6 Petitioner has undertaken to supplement the record with a report showing that he has "occasional difficulties in controlling and regulating his behavior, . . . these difficulties are the result of [a] head injury . . . [and] his behavior in a moment of stress might become distracted, poorly regulated, and out of his conscious control, in part because of the cognitive deficits he sustained as a result of a head injury and in part because he is person who tends to deny and repress his feeling . . . . (Doc. 68, Exh. 2 at 5). Other reports submitted in this proceeding state that the petitioner has "functional brain impairment" due to a head injury (*id.* Exh. 3 at 11) that may have resulted in compromised judgment and impaired impulse control (*id.* at 15-16) and "a diminution of self-control [which] . . . may manifest itself as an increase in irritability, selfishness, restlessness and lack of concern for others." *Id.* Exh. 4 at 6.

Notwithstanding these opinions, which the petitioner claims should be have been presented to the jury in mitigation during the sentencing phase, he is not entitled to

relief. They are essentially speculative, and insufficiently favorable to justify a finding that his lawyers acted incompetently when they declined to seek out and offer evidence about a 1987 head injury and its alleged impairment of his ability to control his impulses.

I note, moreover, that the evidence of record, in addition to enabling the jury to find the petitioner guilty beyond a reasonable doubt, shows that he acted with deliberation and forethought in that he rented a car shortly before the crime (and returned it shortly afterwards), entered the victim's house at a time when he would have known that the victim's grandparents were absent, gained entry by a means made known to him by her grandfather, and he committed the crime following refusal by the United States Supreme Court to hear his challenge to the order that he submit to paternity tests to determine the father of the victim's child. These acts do not manifest impulsive or uncontrolled behavior.

Finally, the petitioner has not shown that he was unable to have developed the record during state post-conviction relief proceedings. Moreover, his defense attorney waived the right to an independent mental examination tr. 2737 Doc. 24 at 85. In sum, the record justifies the conclusion that his lawyers acted deliberately and competently when they decided not to offer evidence of his head injury and its putative effects on his self-control.

The respondent has objected to consideration of these reports. While I agree that they properly should not be a part of the record in this proceeding, I have, in the interest of providing the petitioner with the fullest possible review, considered them as part of my determination of the merits of the petitioner's claim.

20. Failure to Appoint Additional Psychological Expert

The petitioner claims that he was denied due process of law, a fair trial and his right to the effective assistance of counsel n7 when the state trial court refused his request to provide funds for a psychological expert during the investigation phase of his case. The court's reason for doing so was that it had already provided funds for a mitigation expert. Tr. Vol II at 8-10.

> n7 Petitioner also asserts a denial of his right to counsel on this basis in Count 24 of his petition. His right to counsel claim is discussed in subsection 24, infra.

The petitioner did not appeal this ruling on direct appeal. When he raised this claim in his post-conviction relief petition, the trial court ruled that consideration of the claim was foreclosed under the doctrine of res judicata. (Exh. P at 3-4). The state appellate court, affirming that decision, stated, "the trial court's failure to grant appellant's motion for a psychological expert in mitigation is an issue which could . . . have been raised on direct appeal [and] the trial court properly applied the doctrine of res judicata." 1997 WL 764810, *5.

This ruling constitutes a finding of procedural default, which bars consideration of this claim in this proceeding. *See Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994) (failure to comply with Ohio requirements re. direct appeal constitutes procedural default). Consequently, the petitioner is required to show cause for and prejudice from his failure to have complied with Ohio's procedural requirements. *Wainwright*, 433 U.S. at 90-91 (1977); *Morales v. Coyle*, 98 F. Supp. 2d 849, 865 (N.D. Ohio 2000) ("the res judicata rule is an

adequate and independent State ground upon which the State can foreclose federal habeas review of the defaulted federal constitutional claims.").

The petitioner has not undertaken to explain or justify his failure to have included this claim in his direct appeal. Consideration of the claim in this proceeding is, accordingly, foreclosed under the Wainwright doctrine.

In any event, I conclude that no error of a constitutional dimension occurred when the trial judge refused to grant the petitioner's request for additional expert services.

Under O.R.C. § 2929.02.4 the trial court, in a capital case involving an indigent defendant, "shall authorize the defendant's counsel to obtain the necessary services" that are "reasonably necessary for the proper representation" of the defendant, and "shall order . . . payment of the fees and expenses for the necessary services." Pursuant to this provision, the trial court provided funds with which defense counsel employed Patricia Snyder, a "mitigation expert."

Thereafter, petitioner's counsel sought approval to obtain the services of a psychologist to provide an independent psychological examination. Defense counsel expressly declined to avail themselves of the services of the Court Psychiatric Clinic. Instead, counsel insisted that they were entitled to "the services of [a psychological] expert who can and will be in the position of being an advocate in defending him against the indictment returned against him." (Exh. P, Bates # 643).

The trial court refused to grant this request. Tr. Vol. II, at 8-10. Expressing her concern with the additional cost that would be incurred, the trial judge also stated, as an "aside," her concern that granting the request would "undermine" O.R.C. § 2929.03(D)(1). *Id.* at 9.

That statute provides that a court in a capital proceeding:

> upon the request of the defendant, shall require a mental examination to be made, . . .
>
> * * * *
>
> Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division.

Prior to commencement of the punishment phase, the petitioner's attorneys waived the right to a mental examination under this statute. Tr. Vol. XIV at 2737.

It is apparent from the record that the trial court correctly apprehended that petitioner's counsel were trying to avoid having to share with the prosecutor the results of any mental examination of the petitioner. He could have had an examination conducted at the Court Psychiatric Clinic, but was concerned that such examination would not be independent. Alternatively, he could have had a pre-sentencing examination conducted pursuant to § 2929.03(D)(1), but would have had to share copies of the examination with the prosecutor and jury. Instead of accepting these conditions, he sought funds to obtain an examination from a psychological expert of his own choosing, the results of which would not have to be disclosed. n8

> n8 As discussed in subsection 24, infra, the petitioner's right to counsel was not impaired by the requirement of O.R.C. § 2929.03(D)(1) that the results of an examination under that provision must be provided to the prosecutor.

Petitioner claims that denial of his request for an independent and confidential examination deprived him of due process and fundamental fairness at the mitigation stage of his trial. That claim is premised on the implicit contention that he was entitled, as a matter of constitutional law, to have the state pay for a psychologist of his choosing. That premise, as the Sixth Circuit recently has made clear in *United States v. Osoba*, 213 F.3d 913 (6th Cir. 2000), is incorrect. In that federal prosecution the defendant had sought funds to employ a psychiatrist of his choosing to conduct a mental examination. He wanted to use the results in mitigation at sentencing to show he had a reduced mental capacity and thus qualified for a downward departure under the Federal Sentencing Guidelines.

The court in Osoba initially held that the defendant had made an insufficient showing of need under the applicable statute, 18 U.S.C. § 3006A(e)(1), n9 to justify the expenditure of funds for a mental examination. *Id.* at 915-16.

> n9 Section 3006(A)(1) is substantially similar to O.R.C. § 2929.02.4, in that it, like the Ohio provision, authorizes payment for services that the trial court finds are necessary.

To the extent, however, that petitioner implicitly is contending that he was entitled to his choice of a psychologist, the court's opinion in Osoba answers that contention as well:

> Under this Circuit's precedent interpreting *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), the constitution only requires the government to furnish an indigent criminal defendant psychiatric or psychological assistance during the sentencing phase of a trial if 1) the defendant's sanity

> was a significant issue during the trial, or 2) defendant is on trial for his life and the state first presents psychiatric evidence of future dangerousness. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir.1990) (en banc). Due process does not mandate that [the defendant] be given psychological assistance in this case because his sanity is not primarily at issue and he has not been convicted of a capital offense.

213 F.3d at 917; *see also Smith v. Anderson*, 104 F. Supp. 2d 773, 811 (S.D. Ohio 2000) (failure to obtain independent psychologist did not constitute ineffective assistance of counsel where defendant, a drug user, only "sought to show that his mental capacity was diminished through drug and alcohol use, and that this allegedly deprived him of the specific intent necessary to convict him of intentional murder.").

21. Ineffective Assistance of Counsel re. Pretrial Publicity

The petitioner contends that his trial counsel failed adequately to support a motion for a change of venue. This claim was not asserted on direct appeal and, as a result, the trial court held that it was foreclosed by the doctrine of res judicata from consideration on its merits on post-conviction review. (Exh. P at 3-4).

Thereafter, the petitioner did not appeal that finding on appeal of the denial of his post-conviction petition. *See* Exh. S. He has, accordingly, waived this claim. *Murray v. Carrier*, 477 U.S. 478, 489-90, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986) (cause and prejudice standard of Wainwright, supra, applicable to failure to appeal).

In any event, on a review of the record, including the exhibits attached to the petitioner's motion for post-conviction relief, I conclude that the trial court's refusal to change venue was well-founded. Thus, even if the petitioner's claim of ineffective assistance of counsel with regard to that motion could be considered on its merits, despite his defaults, it would not be well taken. Where the decision not to change venue was proper, counsel's handling of the change of venue motion cannot be found to have been ineffective. *See Breeding v. United States*, 840 F.2d 16, 1988 WL 15505 (6th Cir.) (Unpublished Disposition) (where impartial jury impaneled, failure to seek change of venue did not constitute ineffective assistance of counsel); *Durham v. Blankenship*, 461 F. Supp. 492, 501 (W.D. Va. 1978) (counsel who failed to present merely cumulative evidence in support of change of venue motion was not ineffective).

22. Ineffectiveness of Counsel re. Jury Sequestration

Petitioner claims that his trial counsel failed to handle their jury sequestration motion with constitutionally necessary competence. This issue was not raised on direct appeal.

This issue was asserted in petitioner's post-conviction relief petition. Exh. M at 15-16, Bates # 453 - 454. In support of that claim, the petitioner referred to pretrial motions for 1) individualized voir dire, *id.* # 662 - 666, which was granted with regard to questioning about the death penalty and pretrial publicity, *id.* # 670, and 2) sequestration of the jury during the trial, *id.* # 671 - 675, which was denied.

The petitioner claimed in his post-conviction petition that, though his trial attorneys had submitted some articles in support of their sequestration motion, they had not submitted

other articles and recordings of broadcasts for the court's consideration. This, they contended, constituted ineffective assistance of counsel. n10

> n10 The petitioner has never asserted that his trial attorneys mishandled issues relating to possible noncompliance by the jurors with the trial judge's admonitions, Tr. 231, 1721, 1815, 1931, 2014, 2204, 2400, during the trial to refrain from exposure to media accounts about the trial.

The trial court held that consideration of this issue was foreclosed from post-conviction review on the basis of res judicata. Exh. P at 3-4. No appeal was taken from this ruling. Due to his defaults, petitioner cannot be heard on the merits of this claim in this proceeding. Wainwright, *supra*; Murray, supra.

Even if this claim could be considered on its merits, there is no basis for relief. Had counsel not filed any motion to sequester, it is not likely that their performance could have been faulted:

> We cannot find that counsel was inadequate for failing to move to have the jury sequestered during trial. The trial court often admonished the jury to avoid reading newspaper articles or listening to radio reports regarding the trial. Petitioners have shown only that one newspaper story appeared each day for the duration of the trial. They have not shown that the court's admonitions were inadequate or that any juror disregarded those admonitions. We therefore find no basis for concluding that trial counsel's conduct fell below a minimum standard of competency.

United States ex rel. Link v. Lane, 811 F.2d 1166, 1172 (7th Cir. 1987):

Assuming, nonetheless, that petitioner's lawyers performed incompetently when they failed to provide additional materials in support of their motion, the petitioner has not shown that the trial judge would have ruled in his favor. *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) (determinative question is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *cf. Odle v. Calderon*, 919 F. Supp. 1367, 1387 (N.D. Cal. 1996) (no prejudice where petitioner did not show that inclusion of additional material in motion for change of venue might have resulted in a favorable ruling). There is nothing in the record to even suggest remotely that, had trial counsel's motion to sequester been more fulsome, it would have been successful.

23. Ineffectiveness re. Motion for Jury Consultant

The petitioner claims that his trial counsel ineffectively presented a motion for funds for a jury consultant to assist during voir dire. Petitioner did not appeal the denial of this motion on direct appeal. He asserted this claim in his post-conviction petition. The trial court denied the claim on the basis of res judicata. Exh. P at 3-4. The petitioner did not appeal that ruling. Due to his defaults, petitioner cannot be heard on the merits of this claim in this proceeding. Wainwright, supra; Murray, *supra*.

In any event, the claim is without merit. There is no constitutional right to obtain the services of experts at state expense. As the court stated in *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987), the pertinent cases

> hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

(footnotes omitted).

In addition, the court in Moore pointed out:

> Requiring trial courts, both state and federal, to provide for expert assistance—through direct appointment or a grant of funds—would place a substantial, if not onerous, burden on the administration of criminal justice. For example, the trial court would have to (1) appoint a defense expert for every expert available to the government; (2) provide for expert assistance whether or not such assistance turned out to be needed; and (3) provide for any additional experts the appointed experts might need to explore theories that could aid the defense in cross-examining prosecution witnesses or in presenting the defense's case. We question the wisdom of such due process requirements absent a substantial showing, such as the one made in Ake, of a significant benefit to the truth-seeking function of a trial.

Id. at 712 n.8.

The Sixth Circuit has applied Moore in a habeas corpus case in which the petitioner had unsuccessfully sought state

funds to employ a serologist. *Thacker v. Rees*, 841 F.2d 1127, 1988 WL 19179, *8 (6th Cir.) (Unpublished Disposition). After quoting Moore, the court stated:

> our review of the trial court's decision must focus on the showing made as to the necessity of an expert, the type of expert required, how the expert would be useful, and also that a reasonable probability exists that denial of expert assistance would result in a fundamentally unfair trial. Here, petitioner's counsel "offered little more than undeveloped assertions that the requested assistance would be beneficial. . . ."
>
> Petitioner's counsel made no showing that an expert would assist the defense or that without expert assistance his client would be denied a fundamentally fair trial. Defense counsel's statement to the trial court that without his own expert he was incompetent to cross-examine the prosecution's expert is also insufficient. It is undisputed that defense counsel had access to the results and reports of the prosecution's serologist. As a result, defense counsel had prior notice as to the nature of the state serologist's testimony.

(Citations omitted).

Here, to be sure, the petitioner focuses on the alleged inadequacy of the showing made by his trial counsel in support of the request for funds to retain a jury consultant. Any deficiency in the extent or quality of such showing is not relevant, however, absent a right to use jury consultants. Such right, quite simply, does not exist, no matter how useful some lawyers may believe such consultants to be. There is no basis on which the petitioner can contend that his right to a

fundamentally fair trial was abridged by the trial court's decision not to expend funds to enable his counsel to retain a jury consultant.

24. Impairment of Right to Counsel Due to Denial of Motion for Funds for Independent Mental Examination.

The petitioner claims that his right to counsel was improperly impaired by the trial court's refusal to grant his request for funds with which to employ an independent psychologist to conduct a confidential mental examination. He did not raise this claim on direct appeal, and it was denied on post-conviction review on the basis of res judicata. *State v. Frazier*, 1997 WL 764810, *6-7 (Ohio App. 8 Dist.). This claim, accordingly, cannot be considered on its merits in this proceeding. Wainwright, *supra.*

In any event, for the reasons stated in subsection 20, *supra*, petitioner did not have a right to have state funds expended to enable him to obtain the services of an independent psychologist to prepare a confidential report. Consequently, his right to counsel was not impaired.

Moreover, as pointed out in *United States v. Osoba*, 213 F.3d 913 (6th Cir. 2000), a claim "that the denial of the funds caused [the defendant] to suffer the ineffective assistance of counsel in violation of the Sixth Amendment" is "meritless." Such claim, the court noted, "alleges only that his counsel was denied the opportunity to pursue the psychological defense due to the court's denial of funds, not that counsel was ineffective in its own right." *Id.* at 917. This ruling suffices to overrule the petitioner's claim of ineffective assistance of counsel, were it properly before this court on its merits.

25. Prosecutor's Closing Argument

The petitioner claims that his right to a fair trial was denied when the prosecutor made improperly prejudicial statements during his closing argument. The respondent claims that this issue was not presented on direct appeal, and thus is waived. The petitioner asserts that he presented the issue on direct appeal.

It appears from an examination of the petitioner's brief on direct appeal, Exh. D Bates # 65-68, and the appellate court's decision, *State v. Frazier*, 1994 WL 50703, *11 (Ohio App. 8 Dist.), that the petitioner presented a portion of his present claim for appellate review: namely, that the prosecutor engaged in prejudicially improper closing argument during the sentencing phase.

Some portions of the argument which the petitioner challenged on appeal and which he challenges here already have been discussed in subsection 7, *supra*. That discussion, which will not be repeated here, included the prosecutor's reference to the petitioner as a rapist and reference and allusions to evidence outside the record.

Only the claim that the prosecutor misstated the burden of proof is unique to the instant claim. This claim is based on the prosecutor's statement that "People take weights and they take a pound and they put a pound on one side, a pound over here, and if they both have a pound and weigh equal, the scale is balanced. Tr. 2747. The court sustained defense counsel's objection to this statement. There is no reason to believe that the jury disregarded that decision, or allowed the prosecutor's statement to override the judge's instructions as to the burden and standard of proof.

26. Denial of Motion for Change of Venue

The petitioner claims that his right to fundamental fairness and an impartial jury was denied when the trial court denied his motion for a change of venue. In response to the fact that each of the seated jurors stated that he or she could provide a fair trial, regardless of pretrial publicity, the petitioner claims that "it is inevitable that they were tainted beyond any ability of the defense to correct their impressions."

This is an insufficient basis on which to overcome the presumption of correctness that attaches under 28 U.S.C. § 2254(d) to state court findings that jurors can be impartial despite pretrial publicity. *Patton v. Yount*, 467 U.S. 1025, 1037 n.12, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984) (whether juror can lay aside his opinion and render a verdict based on the evidence "is a determination to which habeas courts owe special deference"); *Kordenbrock v. Scroggy*, 680 F. Supp. 867, 887 (E.D. Ky. 1988), *rev'd on other grounds en banc*, 919 F.2d 1091 (6th Cir. 1990) ("Great deference must be awarded to the trial judge who heard the voir dire and who could observe the demeanor of the veniremen.").

Even if the petitioner could be deemed to have overcome the presumption of correctness that attaches to the state court's findings of impartiality as to each of the seated jurors, the petitioner could not prevail on this claim.

In *Murphy v. Florida*, 421 U.S. 794, 800-03, 44 L. Ed. 2d 589, 95 S. Ct. 2031 (1975), the Supreme Court defined the characteristics of a panel of fair and impartial jurors in the face of media publicity. Total ignorance of the allegations against the defendant and other aspects of the case is not required. Thus, as the Supreme Court had earlier stated in *Irvin v. Dowd*, 366 U.S. 717, 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961):

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Where, as in this case, seated jurors state that any preconceived opinions can be put aside, the petitioner must, the Court stated in Murphy, demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." 421 U.S. at 800. No such demonstration has been attempted or made by petitioner in this case.

Even though the petitioner has not met his burden under Murphy, I have examined the materials submitted by the petitioner in support of his pretrial motion in limine to determine whether the "adverse pretrial publicity . . . created such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton, supra*, 467 U.S. at 1031 (discussing Irvin, *supra*). Under *Nevers v. Killinger*, 169 F.3d 352, 366 (6th Cir. 1999), such review encompasses "not only the media coverage itself but the substance of the jurors' statements at voir dire in determining whether there was a 'community-wide sentiment' against the defendant."

The newspaper accounts presented in support of the motion in limine do not raise a presumption of prejudice. Many of the clippings come from papers published outside of Cuyahoga County, where petitioner's trial occurred. The petitioner has made no showing of the circulation in Cuyahgoa County of the out-county papers. The likelihood

that they came to the attention of any of the prospective jurors would appear to be extremely slight. Certainly the petitioner has not met his burden of showing that they had an impact on the members of the venire or the jurors selected for trial. Those clippings shall, accordingly, be disregarded.

The clippings that come from papers published in Cuyahoga County are factual accounts, as in Murphy, *id.* at 802, of the events in the case as they developed. The clippings can generally be divided by subject according to those events: 1) the crime (Exh M, Bates # 469); 2) the search for, *id.* # 511, and arrest of the petitioner, *id.* # 488; 3) release of other suspects, *id.* # 491; the victim's funeral, *id.* # 507; petitioner's indictment, *id.* # 514; results of paternity testing showing that the petitioner was likely to have been the father of the victim's child, *id.* # 530; denial of petitioner's request for bail *id.* # 532; denials by the Hell's Angels of any relationship with the petitioner, who was a former member of that organization, *id.* # 639; relationship between the pending rape charge against the petitioner and the murder charge, *id.* # 541; petitioner's alleged efforts to obtain a plea bargain, *id.* # 547; events at petitioner's Medina County rape trial, including disclosure of his association with the Hell's Angels, *id.* # 551, the playing of a recording of an interview between Tiffany and an investigator, *id.* # 558, testimony by another witness that the petitioner had raped her, *id.* # 564, and his conviction, *id.* # 569); the clearing of a person suspected of obstructing the search for the petitioner, *id.* # 572, # 573; setting of the petitioner's trial date on the murder charge, *id.* # 575; statements by the defense attorneys about the weakness of the state's evidence, *id.* # 577; and the denial of petitioner's motion to suppress his statement to investigators in which he offered to plead guilty. *Id.* # 578.

The last of these articles appeared on July 30, 1991. n11 Voir dire began the preceding day. In her general instructions at the outset of voir dire, the trial judge informed the

prospective jurors that they must be as free "as humanly possible from any sympathy, prejudice, bias or favoritism for either side." Tr. Vol III at 219.

> n11 The petitioner submitted several later articles as exhibits to his post-conviction petition. These, being published after the trial jury had been selected, could have had no bearing on the motion for change of venue.

Some of the seated jurors had either no awareness (Smith, Tr. 475; Ballard, Tr. 655; Coffey, Tr. 781) or no recollection about the case. (Barnette, Tr. 299; Evans, Tr. 111; Holloway, Tr. 636). Other seated jurors' recalled "the name" (Stansberry, Tr. 502); only that the event had occurred (Anderson Tr. 217; Sekerak, Tr. 527; Hardwick, Tr. 646; McNulty, Tr. 700; Jackson, Tr. 710; Merriman, Tr. 758); Tiffany was to testify against the petitioner (Hajek, Tr. 273), the pending charge was for rape (McGinty, Tr. 763); there were multiple stab wounds (McGinty, Tr. 763 the discovery of a footprint (Hajek, Tr. 277), the petitioner had been captured (Pistillo, Tr. 773). All the jurors agreed that they could disregard whatever they may have heard.

Although there was considerable pretrial publicity about the crime and arrest and charges against the petitioner, the trial court's implicit finding that it had seated an impartial jury is entitled to deference. The presumption of correctness as to that finding has not been overcome. In any event, on review of the record of the pretrial publicity and the subsequent voir dire (which displayed the jurors' nearly unanimous and almost complete ignorance about the case), I am persuaded that the finding of actual impartiality is correct.

27. Failure to Sequester the Jury

The petitioner claims that he was denied his right to a fair trial and an impartial jury when the trial court refused to sequester the jury. The petitioner did not assert this claim on direct appeal. It is, therefore, foreclosed under *Wainwright, supra*, and *Murray, supra*, from consideration on its merits.

Even if this claim could be considered on its merits, the petitioner is not entitled to relief, because "there is no federal constitutional right to jury sequestration." *King v. Elo*, 2000 U.S. Dist. LEXIS 8642, 2000 WL 791721, *8 (E.D. Mich.) (citing *Powell v. Rose*, 581 F. Supp. 60, 63 (M.D. Tenn.1983)). As in King, "the trial court's failure to sequester the jury here did not deprive petitioner of due process, where the trial court instructed the jury to avoid reading, listening, or watching the media coverage of the case and there was no evidence that the jury had been tainted by the publicity." *Id.* The trial court frequently reminded the jurors that they were not to have any exposure to articles or broadcasts about the trial. Tr. 231, 1721, 1815, 1931, 2014, 2204, 2400.

Challenges to a trial court's decision not to sequester a jury raise, moreover, issues of state law. *Hughes v. Foltz*, 762 F.2d 1008, 1985 WL 13168, **2 (6th Cir.) (Unpublished Disposition). Thus, absent "demonstrated prejudice, failure to sequester the jury does not warrant federal habeas corpus relief." *Id.* The petitioner's conclusory speculation that "it was impossible that [the jurors] avoided discussion of the case or the vast amount of pretrial publicity which surrounded them," Doc. 8, at 87, is not "demonstrated prejudice."

The petitioner likewise speculates that the jurors violated the trial judge's admonitions to refrain from exposure to media stories about the trial. This is not a sufficient basis for relief:

> "where a jury has been clearly admonished not to read newspaper accounts of the trial in which they are serving as jurors, it is not to be presumed that they violated that admonition." Thus, even when material presented by the news media is prejudicial to the defendant, absent a showing that the jury violated the admonishment, a conviction will not be reversed.

United States v. Metzger, 778 F.2d 1195, 1209 (6th Cir. 1985) (citation omitted). *Accord*, *United States v. Elder*, 90 F.3d 1110, 1130 (6th Cir. 1996); *see also Lupino v. Tahash*, 252 F. Supp. 225, 228 (D. Minn. 1966) (even where there has been substantial publicity, prejudice will not be presumed).

Like the petitioner in *Drake v. Clark*, 14 F.3d 351, 358 (7th Cir. 1994), the petitioner here has not met his burden of establishing a factual basis for relief:

> [Petitioner] contends the trial court's failure to sequester the jury denied him a fair trial because the jurors may have been exposed to publicity (newspaper articles) concerning the trial. "Sequestration is an extreme measure, one of the most burdensome tools of the many available to assure a fair trial." [The state] entrusts the decision of whether to sequester a jury to the sound discretion of the trial court.
>
> [Petitioner] has failed to establish he was denied a fair trial by the trial court's failure to sequester the jury. Drake's claim that the jurors were exposed to newspaper articles concerning the trial is unsupported

> by evidence in the record. In fact, the trial court questioned the jurors about whether they had read newspaper accounts of the case or heard about the case on the radio or television and the jurors indicated that they had not had any contact with these possible types of influence.

(Citations omitted).

28. Waiver of Objection to Error in the Charge

The petitioner claims that his trial counsel provided constitutionally insufficient assistance when he waived objection to how the trial judge read a portion of the charge during the penalty phase. After describing aggravating and mitigating circumstances and the weighing process and defining proof beyond a reasonable doubt, the trial judge told the jurors:

> If all 12 members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances, which the defendant was found guilty of committing, outweigh any mitigating factor, then you must return such finding to the Court.
>
> I instruct you, as a matter of law, that if you make such a finding, then you have no choice and you must recommend to the Court that the sentence of death be imposed upon the defendant, Richard Frazier.

Tr. 2814 (emphasis supplied).

After the charge had been read, defense counsel pointed out to the judge that she had "said recommend," and she acknowledged that she had done so, saying, "It was inadvertent on my part." Tr. 2817. On agreement of the parties, the judge changed the written version of the

instructions which she was sending to the jury room. Apparently the court and counsel had agreed prior to the reading of the instructions that the judge would not use the term "recommend" in the charge. *Id.*

The petitioner claims that his trial counsel improperly agreed to this procedure, claiming that it constituted a waiver of his right to have the jury understand its proper role in the ultimate sentence. According to the petitioner, telling the jurors that they "recommend" a death sentence violated the Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985). Under Caldwell, the jurors cannot be given a mistaken impression that their verdict is merely a recommendation, and that the ultimate responsibility for determining the defendant's sentence rests elsewhere. 472 U.S. at 329.

Petitioner did not present this claim to the Ohio courts. It is, accordingly, waived under Wainwright, *supra*, and Murray, *supra*, and need not be considered on its merits.

In any event, the claim is without merit because the trial judge's charge was a correct statement of Ohio law, and does not contravene the Caldwell doctrine.

Under Ohio law the jury is required to recommend a death sentence if it concludes that the evidence of aggravating circumstances outweighs evidence of mitigating circumstances. O.R.C. § 2929.03(D)(2). For a death sentence to be imposed, the trial judge must also reach the same conclusion. O.R.C. § 2929.03(D)(3). If, however, the jury concludes that a life sentence is appropriate, its decision is binding. O.R.C. § 2929.03(D)(2). Thus, under Ohio law, a jury's death verdict is, in fact and law, a recommendation—just as the jury was told—which the trial judge must independently accept before a death sentence can be imposed. Ohio has placed the final decision in the hands of

the court. *Mapes v. Coyle*, 171 F.3d 408, 415 (6th Cir. 1999) (informing jurors that their recommendation is only a recommendation "is an accurate statement of Ohio law").

Because the jury was given an accurate, rather than a misleading statement of the allocation of ultimate responsibility, no error resulted from the trial judge's instruction. *Scott v. Mitchell*, 209 F.3d 854, 877 (6th Cir. 2000) ("Caldwell is limited to situations in which the jury is misled as to its role"); *Mapes, supra,* 171 F.3d at 415 ("'to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'") (citing *Romano v. Oklahoma*, 512 U.S. 1, 9, 129 L. Ed. 2d 1, 114 S. Ct. 2004 (1994)).

There was, accordingly, no error in the charge as given, even if its text included language that the parties and court had agreed would not be included. There being no error in the charge, counsel was not ineffective when he declined to object to the procedure adopted by the judge in response to her inadvertence.

29. Errors in the Penalty Phase Jury Charge

The petitioner claims that the court's charge during the penalty phase incorporated three errors, each of which entitles him to a new sentencing hearing. According to the petitioner, the trial judge improperly 1) stated there was only one mitigating factor (namely, residual doubt); 2) required unanimity as to mitigating factors; and 3) instructed the jurors that reasonable doubt would be present where the jurors could not be convinced of the "truth of the charge."

These issues were not raised on appeal. They are, accordingly, foreclosed from consideration on their merits in this proceeding under Wainwright, supra, and Murray, *supra.*

In any event, the claims are without merit.

Contrary to the petitioner's assertion, the trial record does not show that the court instructed the jury that there was only one mitigating factor. It made clear that the jury could consider in mitigation "Any other factors that are relevant to the issue of whether the offender should be sentenced to death." Tr. 2812. The court then pointed out—by way of explanation, rather than limitation—that the petitioner had asserted that residual doubt exists. Finally, the court noted that the petitioner had the burden of proof on this issue of mitigation. Nothing in the court's charge can fairly be construed as limiting the jury's consideration of mitigating factors.

There is, contrary to the petitioner claim that the trial judge instructed the jury that any finding of mitigating factors had to be unanimous, no such instruction in the record. The judge told the jury that their finding as to aggravating circumstances had to be unanimous. Tr. 2814. She gave no similar instruction with regard to mitigating factors.

In any event, any understanding that the jury may have had that it had to be unanimous in its decision to return a life sentence (the only alternative available to it other than a death sentence) would not have been improper. *Coe v. Bell*, 161 F.3d 320, 337 (6th Cir. 1998). In Coe, the Sixth Circuit

found no error where the jury was instructed that, for both a death verdict and a life imprisonment verdict, the decision had to be unanimous.

Finally, no error resulted from the trial court's statement, in defining reasonable doubt, that such doubt was present when "you cannot say that you are firmly convinced of the truth of the charge." In context, the "charge" to which the court was referring was the contention, as to which the jurors were told the state had the burden of proof, "that the aggravating circumstances that the defendant was found guilty of committing outweigh any factors in mitigation of the imposition of the death sentence." (Emphasis supplied).

30. Failure to Use Jury Interrogatories

The petitioner claims that the trial court committed constitutional error when it used a single verdict form on which the jurors were to record their verdict for death or life. This claim was not raised on appeal, and cannot be considered on its merits in this proceeding. Wainwright, supra; Murray, *supra.*

In any event, the claim is without merit. There is no constitutional right to jury interrogatories. *See Griffin v. United States*, 502 U.S. 46, 48-49, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991) (due process not violated with use of single verdict re. multi-object conspiracy charge); *United States v. Console*, 13 F.3d 641, 663 (3rd Cir. 1993) (trial court has discretion to submit a single verdict or interrogatories); *United States v. Smith*, 938 F.2d 69 (7th Cir. 1991) ("While special interrogatories or verdicts are generally not favored in criminal cases, they are permitted.").

Conclusion

In light of the foregoing review and consideration of each of the petitioner's claims on its merits, including those several claims as to which such review is foreclosed as a result of procedural default, I conclude that the petitioner is not entitled to habeas corpus relief.

It is, accordingly, hereby ORDERED THAT the petition for a writ of habeas corpus be, and the same hereby is denied.

So ordered.

James G. Carr
United States District Judge

APPENDIX E

SUPREME COURT OF OHIO

Case No. 98-149

State v. Frazier.

Decided: April 1, 1998

OPINION

DISMISSAL, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEAL, IF APPLICABLE, NOT ALLOWED

APPENDIX F

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

Case No. 71746

STATE OF OHIO,
Plaintiff-Appellee,

v.

RICHARD FRAZIER,
Defendant-Appellant.

Date of Announcement of Decicion: December 11, 1997

Before: KENNETH A. ROCCO, JUDGE. JOSEPH J. NAHRA, P.J., AND TERRENCE O'DONNELL, J., CONCUR.

COUNSEL

FOR PLAINTIFF-APPELLEE: Stephanie Tubbs-Jones, Esq., Cuyahoga County Prosecutor, By: John R. Mitchell, Esq., Assistant County Prosecutor, Cleveland, Ohio.

FOR DEFENDANT-APPELLANT: Thomas J. Escovar, Esq., David Paul Bradley, Esq., Cleveland, Ohio.

OPINION BY: KENNETH A. ROCCO

OPINION
JOURNAL ENTRY AND OPINION

ROCCO, J.:

Defendant-Appellant Richard Frazier, convicted for aggravated murder and sentenced to death therefor, appeals from the trial court orders which first denied his petition for post-conviction relief and then denied his motion for relief from that judgment.

Appellant argues that in considering his motion for post conviction relief, the trial court failed to follow the requirements of R.C 2953.21(C) and inappropriately applied the doctrine of res judicata to one of the claims he raised. Appellant also argues he provided sufficient evidence to demonstrate he was entitled to relief from the order denying his petition.

This court has reviewed the App.R. 9(A) record on appeal, finds trial court properly entered judgment against appellant and accordingly affirms.

Appellant was indicted in 1990 on three counts for the aggravated murder of his eighteen-year-old stepdaughter, Tiffany Skiba, and the aggravated burglary of her grandparents' home. The first two counts carried three specifications, *viz.*, felony murder, murder of a witness, and murder to escape accounting for another crime, to wit: rape.

The record reflects appellant entered a plea of not guilty to the indictment and was assigned as counsel attorneys Tim Gaunter and Jerry Milano. Approximately a week later, attorney Ralph Buss filed a request to "be entered also as attorney of record for [appellant.]"

On February 28, 1991, appellant filed a motion for authority to hire "mitigation expert" Patricia Snyder to assist in his defense "in the event there is a guilty verdict involving capital punishment." By this time, attorney Robert L. Tobik also had joined the defense team. Appellant's motion was granted.

On March 8, 1991, appellant filed a motion for release of all records "which concern [his] medical, psychological, hospital, institutional, legal, educational and/or employment history." The trial court subsequently issued a journal entry stating appellant had withdrawn this motion "as [an] agreement has been reached between [the] parties."

On July 10, 1991, pursuant to R.C 2929.024 n1 appellant filed a motion for additional funds to hire a psychologist as a mitigation expert. The trial court subsequently denied this motion, stating as the main basis for its decision the fact that it had previously granted funds to appellant so that he could obtain the mitigation expert already specifically requested by him.

n1 R.C 2929.024 states in pertinent part:

> If the court determines that the defendant is indigent and that *investigation* services, *experts,* or other services are *reasonably necessary* for the proper representation of a defendant charged with aggravated murder at trial or *at the sentencing hearing,* the court shall authorize the defendant's counsel to obtain the

necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made ***.

(Emphasis added.)

On August 16, 1991, appellant filed a motion *in limine*, requesting the trial court to enter an order "limiting the ability of the prosecutor to present rebuttal evidence" to only those mitigating factors raised by the defense.

On August 20, 1991, appellant's jury trial commenced. Ultimately, the jury found appellant guilty of the charges against him, and following the mitigation phase of the proceedings, recommended a sentence of death.

On August 29, 1991, the trial court entered its opinion and order imposing the death penalty for the aggravated murder convictions. The trial court stated that appellant presented only one mitigating factor pursuant to R.C 2929.04(B)(7), *viz.*, through his unsworn statement, he attempted to establish residual doubt. The trial court found "no mitigating value whatsoever in [that] issue ***."

On October 8, 1991, the trial court appointed new attorneys to represent appellant with regard to the appeal of his convictions.

On direct appeal, this court examined the complete record and on February 17, 1994, affirmed appellant's convictions and sentences in App. No. 62557. n2

n2 In App. No. 62557, appellant assigned as error the following:

1) the trial court's admission of certain evidence during the guilt phase of his trial (Assignments of

Error I, II, III, IV, VI and VIII); 2) the trial court's failure to dismiss portions of the indictment against him (Assignment of Error V); 3) the trial court's failure to limit the prosecutor's argument during the sentencing phase of his trial (Assignment of Error VII); 4) the trial court's failure to merge the specifications of the indictment during the sentencing phase (Assignment of Error IX); 5) the trial court's failure during *voir dire* to excuse certain jurors while permitting other jurors to serve (Assignment of Error X); 6) the trial court's instructions to the jury during the guilt phase (Assignments of Error XI and XII); 7) the trial court's failure to grant his motions for acquittal (Assignment of Error XIII); and 8) the constitutionality of his death sentence (Assignment of Error XIV).

Appellant thereupon appealed this court's decision to the Ohio Supreme court. Once again, appellant was declared indigent and new counsel was appointed for purposes of his appeal. The Ohio Supreme Court affirmed appellant's convictions in *State v. Frazier* (1995), 73 Ohio St. 3d 323. n3, 652 N.E.2d 1000

n3 In the Ohio Supreme Court, appellant, in pertinent part, challenged the following:

1) the trial court's actions during *voir dire*; 2) the trial court's instructions to the jury during the guilt phase of his trial; 3) the trial court's failure to dismiss the indictment; 4) the trial court's failure to exclude certain evidence during the guilt phase and to limit certain comments made by the prosecution during guilt phase closing argument; 5) the trial court's failure to grant his motions for acquittal; and 6) the trial court's failure to merge the specifications of the indictment.

Thereafter, the United States Supreme Court denied appellant's petition for a writ of *certiorari*; *Frazier v. Ohio* (1996), 133 L. Ed. 2d 763, 116 S. Ct. 820.

On July 31, 1996, pursuant to R.C 2953.21 appellant filed his petition for post conviction relief in the trial court. Therein, appellant alleged his death sentence was void because of errors of constitutional dimension which occurred at his trial. Appellant labeled these errors "causes of action" and set forth six of them.

Appellant alleged in his first cause of action that trial counsel were ineffective for their failure to adequately prepare for the mitigation phase of his trial. Appellant alleged in his second and sixth causes of action that the trial court's failure to allow funds for a second mitigation expert compromised trial counsel's ability to render effective assistance.

Appellant's third, fourth and fifth causes of action alleged trial counsel also were ineffective for their failure to obtain a change of venue, their failure to obtain sequestation of the jury, and their failure to obtain a psychological expert for purposes of helping in the selection of jurors.

Appellant's petition was supported by one hundred and seventy-two exhibits. These included many copies of newspaper articles, pleading and judgment entries from the original trial proceedings, and the affidavit of Sharon L. Pearson, Psy.D.

In her affidavit, Ms. Pearson opined that as a part of the presentation of his mitigation defense, appellant should have been clinically evaluated by a licensed psychologist. She further opined that without the results of psychological tests and clinical examination, "it is not possible to know if

[appellant] suffered from a mental disease at the time of the crimes charged against him. Moreover, the test results would also indicate *** whether [appellant] would require further referral to a neuropsychologist to determine whether [appellant] suffered from organic brain impairment."

Ms. Pearson further stated that her review of appellant's medical record indicated he had fallen and hit his head in July 1987 and continued to have physical complaints resulting from the fall. She concluded the trial court's failure to approve funds for a psychologist "foreclosed" trial counsel from "determining if [appellant] suffered from a mental disease or defect ***."

The state responded with a motion to dismiss appellant's petition. The state addressed each of appellant's causes of action and argued appellant's attached evidence was insufficient either to warrant a hearing on his petition or to demonstrate any substantive grounds for relief.

On November 26, 1996, the trial court dismissed appellant's petition and issued Findings of Fact and Conclusions of Law. The trial court determined that each of appellant's causes of action was barred by the doctrine of *res judicata.*

On December 6, 1996, appellant filed objections to the trial court's order. On December 9, 1996, pursuant to Civ.R. 60(B), he filed a motion for relief from judgment.

Appellant alleged therein the trial court's order dismissing his petition for postconviction relief was "in violation of" the standard of review required by R.C 2953.21. Appellant based his allegation on his assertion the trial court "did not have before it a copy of the transcript of the proceedings." He argued, therefore, he was entitled to relief from the trial court's order on the basis of both Civ.R.

60(B)(1) due to "judicial inadvertence," and Civ.R. 60(B)(2) since he had newly discovered evidence not available at the original trial.

Appellant supported his motion with the affidavits of his two attorneys and another affidavit from Sharon L. Pearson. In pertinent part, one of appellant's attorneys stated that after some investigation he "assume[d] that the Court did not have the opportunity to review the 14 volume transcript before rendering a decision on the [petition]." Similarly, appellant's other attorney stated he "believe[d] *** the trial court did not have before it 'all of the files and records ***.'" Ms. Pearson, moreover, stated she had tested appellant and "found psychological evidence to warrant further testing by a neuro-psychologist" because appellant had "suspected brain damage."

On December 16, 1996, appellant filed his notice of appeal from the trial court order which denied his petition for post conviction relief. In an entry journalized on December 23, 1996, the trial court denied appellant's motion for relief from judgment.

Appellant presents four assignments of error for this court's review. The first three concern the same issue, thus, they are addressed together as follows:

I. THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT AN INDEPENDENT REVIEW OF THE RECORD BEFORE RENDERING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY OHIO REVISED CODE SECTION 2953.21.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO RECOGNIZE A DENIAL OF THE APPELLANT'S RIGHTS SO AS TO RENDER THE

JUDGEMENT (SIC) AGAINST HIM VOID OR VOIDABLE UNDER THE OHIO CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

III. THE TRIAL COURT ERRED FINDING THAT THE DOCTRINE OF RES JUDICATA APPLIED TO NEWLY DISCOVERED EVIDENCE WHICH WAS NOT AVAILABLE TO THE DEFENDANT AT THE TIME OF TRIAL BECAUSE THE TRIAL COURT DENIED THE DEFENDANT EXPERT ASSISTANCE.

In these assignments of error, appellant argues the trial court improperly denied his motion for post conviction relief. Although appellant rests his argument essentially upon two separate contentions, this court remains unpersuaded.

Appellant first contends the trial court could not have complied with the requirements of R.C 2953.21 prior to dismissing his petition. He asserts that 1) the trial court's failure to explicitly state it had reviewed the entire record; and 2) its references in its Findings of Fact and Conclusions of Law to only two of his original trial attorneys, together with 3) the affidavits of his attorneys attached to his motion for relief from judgment, prove this contention. Appellant further contends he provided sufficient evidence to demonstrate both that counsel's effectiveness was compromised by the trial court's action in denying him funds for a psychological expert prior to trial, and that he had newly discovered evidence rendering his conviction void or voidable.

R.C 2953.21 provides in pertinent part:

Petition for postconviction relief.

(A)(1) Any person who has been convicted of a criminal offense*** who claims that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

* * *

(C) *** *Before granting a hearing,* the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court and the court reporter's transcript. *** If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

* * *

(E) *Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues* ***.

* * *

> (I) The remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case. ***

(Emphasis added.)

Absent a showing of abuse of discretion, a reviewing court will not overrule the trial court's finding on a petition for postconviction relief which is supported by competent and credible evidence. *State v. Mitchell* (1988), 53 Ohio App. 3d 117, 559 N.E.2d 1370; *see also*, *State v. Williams* (1991), 74 Ohio App. 3d 686, 600 N.E.2d 298.

Initially, appellant essentially contends the trial court's findings cannot be deemed supportable because in its Findings of Fact and Conclusions of Law, the trial court neglected to explicitly state it had reviewed the entire proceedings and, further, neglected to list all of his trial attorneys.

However, there is no requirement in R.C 2953.21 which indicates the trial court must detail the documents it has reviewed in considering a petition. *See, e.g., State v. Williams, supra*; *State v. Lawson* (1995), 103 Ohio App. 3d 307, 659 N.E.2d 362; *State v. Scott* (1989), 63 Ohio App. 3d 304 at 308, 578 N.E.2d 841.

Furthermore, the trial court's failure to list all of appellant's trial attorneys does not compel the interpretation arrived at by appellant, since the purpose of the court's Findings of Fact and Conclusions of Law is only to sufficiently apprise appellant of the basis of the trial court's

decision. *State v. Mapson* (1982), 1 Ohio St. 3d 217 at 219, 438 N.E.2d 910; *State v. Lawson, supra*; *cf., State v. Wilson* (1996), 110 Ohio App. 3d 178, 673 N.E.2d 946.

Finally, the affidavits of appellant's attorneys are of no evidentiary value, since the conclusions contained in them are not based upon personal knowledge but rather upon hearsay. Evid.R. 801(C), 802; *Tasin v. SIFCO* (1990), 50 Ohio St. 3d 102 at 107, 553 N.E.2d 257.

This court presumes regularity in the proceedings below. *State v. Edwards* (1987), 31 Ohio App. 3d 114, 508 N.E.2d 1046. Since there is nothing in the record to support appellant's claim the trial court failed to comply with the requirements of R.C 2953.21, this court rejects it.

With regard to appellant's remaining contention, the following was stated in *State v. Cole* (1982), 2 Ohio St. 3d 112, 443 N.E.2d 169:

> *Appellant argues *** that he should been afforded a hearing on his claim. A criminal defendant seeking to challenge his conviction(s) through a petition for postconviction relief, is not, however, automatically entitled to such a hearing. State v. Jackson* (1980), 64 Ohio St. 2d 107, 110 [18 Ohio Op. 3d 348, 413 N.E.2d 819]. Indeed, the trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing. As R.C 2943.21(C), in pertinent part, provides *"Before* granting a hearing [on a petition for postconviction relief] the court *shall* determine whether there are *substantive* grounds for relief."

(Emphasis added.) *See also State v. Kapper* (1983), 5 Ohio St. 3d 36, 448 N.E.2d 823; *State v. Pankey* (1981), 68 Ohio St. 2d 58, 428 N.E.2d 413.

This rule of law was stated again in *State v. Shugar* (May 21, 1992), Cuyahoga App. No. 62536, unreported, as follows:

> It is well-settled that a trial court may deny a petition for post conviction (sic) relief *** without conducting an evidentiary hearing when defendant fails to submit *sufficient* evidentiary materials *and the record demonstrates* defendant is not entitled to relief.

(Emphasis added.) *See also*, *State v. Ledger* (1984), 17 Ohio App. 3d 94, 477 N.E.2d 643.

Simply because appellant produced "a multiplicity of printed pages" the trial court was not required to "consume limited judicial resources" and to hold a hearing on his petition. *State v. Spisak* (1988), 36 Ohio St. 3d 80 at 82, 521 N.E.2d 800. Appellant's materials, although lengthy, failed to support his claims.

A review of appellant's "causes of action" set forth in his petition for postconviction relief clearly reveals most of them were based upon occurrences which formed a portion of the record. This includes the trial court's denial of appellant's trial counsels' motion for a "psychological expert" in mitigation.

Certainly, since in App.No. 62557 and *State v. Frazier* (1995), 73 Ohio St. 3d 323, 652 N.E.2d 1000, appellant, represented by new counsel in both instances, raised many challenges to the trial court's actions, there is no reason why the trial court's failure to grant appellant's motion for a psychological expert in mitigation is an issue which could not also have been raised on direct appeal. *State v. Allen* (1995), 73 Ohio St. 3d 626, 653 N.E.2d 675; *cf., Glenn v. Tate* (6th Cir. 1995), 71 F.3d 1204. Thus, the trial court

properly applied the doctrine of *res judicata. State v. Szefcyk* (1996), 77 Ohio St. 3d 93, 671 N.E.2d 233; *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104; *State v. Ishmail* (1981), 67 Ohio St. 2d 16, 423 N.E.2d 1068; *State v. Cole, supra*; *State v. Ledger, supra*; *State v. Jenkins* (1987), 42 Ohio App. 3d 97, 536 N.E.2d 667; *State v. Apanovitch* (1991), 70 Ohio App. 3d 758, 591 N.E.2d 1374; *State v. Stallings* (July 15, 1993), Cuyahoga App. No. 63147, unreported.

In an attempt to overcome the doctrine of *res judicata and* to support his claim trial counsel was unable to render effective assistance under the circumstances, appellant asserts Ms. Pearson's opinion that he may have suffered from a "mental disease" or "organic brain impairment" is evidence which was unavailable at trial. However, the record does not support this assertion. Rather, the record indicates appellant's attorneys were aware of this information, since they filed and thereafter withdrew a motion for release of appellant's medical records.

It is well settled that in this state, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299, 209 N.E.2d 164. Moreover, a reviewing court will not second-guess what could be considered to be a matter of trial strategy. *State v. Smith* (1985), 17 Ohio St. 3d 98, 477 N.E.2d 1128.

From the record, it can reasonably be concluded trial counsel were appraised of the purported brain injury from their review of medical records; however, as a matter of trial strategy counsel deemed this avenue of defense unworthy of further pursuit. *See, e.g., State v. Allen* (1995), 73 Ohio St. 3d 626 at 642, 653 N.E.2d 675. This conclusion is reinforced by three factors: 1) counsel's argument to the trial court that a psychologist would be used merely to interpret the mitigation expert's findings; 2) counsel's filing of the motion requesting

a limitation on references to mitigation factors to only those upon which appellant ultimately relied; and 3) the thorough and professional manner in which counsel conducted appellant's defense during both the guilt and the penalty phase of appellant's trial. The facts of this case, therefore, are completely inapposite to those set forth in *Glenn v. Tate, supra,* upon which appellant relies. *State v. Combs* (1994), 100 Ohio App. 3d 90, 652 N.E.2d 205; *cf., State v. Mullins* (1995), 104 Ohio App. 3d 684, 662 N.E.2d 1142.

In view of the fact that appellant had the assistance of at least three experienced attorneys during all phases of the trial proceedings, and mindful that a reviewing court will not second-guess what are essentially matters of trial strategy, neither the record nor appellant's evidence provided *dehors* the record supported his claim. *State v. Apanovitch, supra; State v. Mitchell, supra*; *cf., State v. Swortcheck* (1995), 101 Ohio App. 3d 770, 656 N.E.2d 732; *State v. Scott, supra.*

For the foregoing reasons, the trial court did not err in failing to either grant a hearing or reverse appellant's convictions and sentences, hence, appellant's first, second and third assignments of error are overruled.

Appellant's fourth assignment of error follows:

THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT RELIEF UNDER OHIO RULE OF CIVIL PROCEDURE 60(B).

Appellant argues the trial court improperly denied his motion for relief from judgment.

In view of the mandate set forth in R.C 2953.21(I), it is doubtful appellant's motion might properly be considered by the trial court. However, assume *arguendo* appellant's motion was appropriately filed, the subsequent filing of

appellant's notice of appeal divested the trial court of jurisdiction to consider it. *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St. 3d 141, 637 N.E.2d 890; *Post v.* Post (1990), 66 Ohio App. 3d 765, 586 N.E.2d 185.

Since this court made no order remanding the matter for consideration of appellant's Civ.R. 60(B) motion, the trial court's ruling on it was a nullity. *Majnaric v. Majnaric* (1975), 46 Ohio App. 2d 157, 347 N.E.2d 552. Therefore, this court also lacks jurisdiction to consider the matter. *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc., supra.*

For the foregoing reasons, appellant's fourth assignment of error is also overruled.

The order of the trial court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOSEPH J. NAHRA, P.J., AND TERRENCE O'DONNELL, J., CONCUR.

JUDGE KENNETH A. ROCCO

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26 (A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S. Ct. Prac.R. II, Section 2(A)(1).

No. 03-1382

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

October Term 2003

STEPHEN J. HUFFMAN, Warden, *Petitioner*,

v.

RICHARD M. FRAZIER, *Respondent*.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent asks leave to file the attached brief in opposition to Petitioner's petition for a writ of certiorari and to proceed *in forma pauperis*.

The United States Court of Appeals for the Sixth Circuit has appointed Respondent's counsel under the Criminal Justice Act of 1964, 18 U.S.C. §3006A.

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STEPHEN J. HUFFMAN, Warden, *Petitioner*,

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should review the Sixth Circuit panel's application of *Strickland v. Washington* in granting Respondent a conditional writ of *habeas corpus* on his capital sentence where that decision: (a) was based on the particular circumstances of this case; (b) applies the established precedents of this Court; and (c) does not conflict with the decisions of other courts of appeals.

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INTRODUCTION

The petition, despite the State's attempts otherwise, presents no significant or important legal issues and no conflict among the courts of appeals. At bottom, this is a case in which the court of appeals applied well-established precedents from this Court, consistent with decisions from other courts of appeals, and granted conditional *habeas* relief limited to Respondent Richard M. Frazier's criminal sentence. The State's petition vastly overstates and exaggerates the reach of the court of appeals decision, which is plainly limited to the specific circumstances presented in this case. Thus, while the State continues to disagree with the panel's result in this case, it has not presented a compelling argument for review by this Court.

The petition attacks the Sixth Circuit's specific application of *Strickland v. Washington* here. In an attempt to make this case into more than one particular result in one particular case, the State suggests that the court of appeals made a legal error with respect to application of *Strickland*. But that contention is belied by the decision's own language, which correctly cites all of the legal standards applicable to this case, and by subsequent decisions of the Sixth Circuit, which in no way suggest that the present case resulted in a sea change in *habeas* law.

The state asserts that the Sixth Circuit decision conflicts with the decisions of other courts of appeals, but the Sixth Circuit itself perceived no conflict with any other court on any other issue. The Sixth Circuit's decision makes no broad legal pronouncements and does not announce any new legal rules or standards. The cases that are cited by the State that supposedly "conflict" with the court of appeals decision here all involved the application of settled legal principles to completely different, case-specific situations.

Finally, this case is not a good vehicle for this Court's review. The result would likely be reaffirmed on remand based on Respondent's wholly separate theory of prosecutorial misconduct, which was explicitly reserved for decision by the Sixth Circuit given the result in the case.

STATEMENT OF THE CASE

Respondent was found guilty of murder in Ohio state court in August 1991. The jury that convicted him recommended a death sentence, which was adopted by the trial judge. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003), Petition Appendix A at 6a. At trial, the prosecution augmented its circumstantial case with pervasive acts of prosecutorial misconduct, including references to the victim's character during closing and rebuttal arguments, using a photograph of the victim before her death during closing argument, and using an empty chair during closing argument to "represent" the victim. Pet. App. 16a.

During the penalty phase, the prosecution built on its guilt phase misconduct by continuing its pattern of improper activity. In addition, defense counsel introduced no mitigation evidence, despite the fact that they were aware that Frazier had sustained a severe brain injury which, in the opinion of post-conviction experts, affected Frazier's impulse control, social judgment and reasoning, and likely bore a correlation to his criminal conduct. *Id.* at 19a-21a . The sum total of the evidence presented on Frazier's behalf during the sentencing phase of the trial was an unsworn statement by Frazier denying his guilt. *Id.* On August 29, 1991, the trial court adopted the jury's recommendation that Frazier be sentenced to death. *Id.* at 6a.

Frazier appealed his conviction and sentence through the Ohio state courts, both on direct appeal and through a petition for post-conviction relief. He then initiated

federal proceedings for a writ of *habeas corpus* pursuant to 28 U.S.C. §2254 in September of 1998. *Id.* at 7a.

After the United States District Court for the Northern District of Ohio denied Frazier's petition, the Sixth Circuit affirmed with respect to his conviction but issued a conditional writ with respect to his sentence. The court determined that Frazier was denied his constitutional right to the effective assistance of counsel where Frazier's trial counsel failed both to investigate and present mitigating evidence during the penalty phase of the trial. *Id.* at 35a. Addressing the failure of Frazier's trial counsel to investigate or present any mitigation evidence, the Sixth Circuit noted that it "could conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." *Id.* at 21a. Applying a long list of cases from the Sixth Circuit as well as this Court, and considering record evidence that had been admitted both in the state post-conviction proceedings and in the district court, the Sixth Circuit held that the Ohio state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase "was not simply erroneous, but unreasonable." *Id.*

Further, the Sixth Circuit concluded that "had the jurors been confronted with the mitigating evidence of Frazier's brain injury, the probability that at least one juror would not have decided that the aggravating circumstances of the case outweighed the mitigating circumstances of the case beyond a reasonable doubt 'is a probability sufficient to undermine confidence in the outcome'." *Id.* at 29a (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Under *Strickland*, and under the framework for

habeas review established by the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. §2254 et seq.), the Sixth Circuit reversed the judgment of the district court and granted Frazier a conditional writ of *habeas corpus* pending the State's initiation of a new penalty-phase trial. *Id.* at 35a.[1]

The court of appeals' grant of relief was limited to Frazier's sentence. Although the court was troubled by the pervasive prosecutorial misconduct that marked the guilt phase of the case, the court refused to say that the state court's disposition of that issue was unreasonable. *Id.* at 18a. Because, however, the court granted the conditional writ regarding Frazier's sentence on ineffective assistance of counsel grounds, the court determined that it was unnecessary for it to address his separate argument regarding the effect of the additional and more egregious misconduct at the penalty phase of his trial.

The State petitioned for rehearing and rehearing en banc, which the Sixth Circuit rejected.

REASONS FOR DENYING THE PETITION

The decision of the Sixth Circuit represents nothing more than an application of established law from this Court as well as of the Sixth Circuit itself. Petitioner raises two questions in its petition, neither of which presents a legitimate conflict among the circuits or question of national import that would warrant resolution by this Court. This case presents no issues that have not already been addressed by several decisions from this Court, including at least three recent cases: *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *Bell v. Cone*, 535 U.S. 685 (2002); *Williams v. Taylor*, 529 U.S. 362 (2000).

---

[1] Judge Batchelder dissented on procedural default grounds, but the State had not raised that argument with respect to the ineffective assistance claim that was the grounds for relief (Pet. App. 32a), and the State has now abandoned that argument.

I. THE COURT OF APPEALS CORRECTLY APPLIED *STRICKLAND V. WASHINGTON.*

Petitioner first urges (Pet. 19) the Court to grant review to address the issue of whether the Sixth Circuit, in this particular case, correctly applied the presumption of adequate performance that, under *Strickland v. Washington*, 466 U.S. 668 (1984), is to be afforded defense counsel when analyzing constitutional ineffective assistance of counsel claims. That contention is unavailing.

A. The Court of Appeals Correctly Stated and Applied *Strickland*'s Presumption.

The State claims that the Sixth Circuit reversed the presumption afforded to defense counsel in this case. In so doing, however, the State misconstrues the Sixth Circuit's analysis of Frazier's counsel's performance at sentencing. Petitioner claims that the Sixth Circuit "presumed that trial counsel had behaved unreasonably in allegedly failing to investigate Frazier's brain injury." Pet. 13. In its opinion below, however, the Sixth Circuit clearly stated the correct direction in which the *Strickland* presumption flows:

> In order to avoid second-guessing trial counsel's strategic decisions, " a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

Pet. App. 20a (quoting *Strickland*, 466 U.S. at 689). Indeed, the court of appeals went further and noted the distinction, under AEDPA, between applying "the first prong of *Strickland* unreasonably, or only erroneously." Pet. App. 23a (citing *Bell v. Cone*, 535 U.S. 685 (2002)). Thus, the state here is simply disagreeing with the way that the Sixth Circuit applied this Court's precedents in this particular case. There was no sweeping change in the law announced by the court or effectively adopted by it.

Far from reversing the *Strickland* presumption, the Sixth Circuit determined that Frazier overcame the initial presumption of reasonable performance by showing that trial defense counsel had available to it information suggesting serious brain injuries to Frazier which, had such information been investigated and developed properly, could have been used as valuable mitigation evidence at the penalty phase of the trial. Pet. App. 21a. In other words, the Sixth Circuit found that Frazier carried his burden of showing that defense counsel's actions at the penalty phase reflected no rational trial strategy.

The State now takes the Sixth Circuit and the district court to task for not conducting an evidentiary hearing before applying *Strickland*. But the State has not previously mentioned the need for an evidentiary hearing in this case. In fact, the Sixth Circuit specifically noted that the "state has not challenged the contention that Frazier's counsel could have developed this same information [regarding Frazier's brain impairment] had they conducted a reasonable investigation." Pet. App. 21a. Thus, the State, having decided not to make certain arguments in the courts below regarding Frazier's counsels' performance, now seeks to revisit that issue by claiming that an evidentiary hearing is necessary. This Court should decline that invitation.

B. The Sixth Circuit Decision Does Not Conflict With The Decisions of This Court.

In that same vein, the State quotes extensively from this Court's recent decision in *Massaro v. United States*, 123 S. Ct. 1690 (2003), a procedural default case that held that §2255 petitioners need not have raised claims of ineffective assistance of counsel on direct appeal to raise them on collateral review. The Court noted that an evidentiary hearing on collateral review to examine ineffective assistance claims was generally preferable because the trial record, standing alone, might not disclose enough information

to allow the court of appeals to make a *Strickland* determination on direct review. Nothing in *Massaro*, however, indicates that an evidentiary hearing is required to make such a determination. And, in fact, in noting that such claims could still be raised on direct review, the court stated that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." 123 S. Ct. at 1696. The Court further found that "[t]here may be instances too, when obvious deficiencies in the representation will be addressed by an appellate court *sua sponte*." *Id.* In this case, the Sixth Circuit found Respondent's trial counsel's strategy to be "on its face irrational." Pet. App. 24a.

Moreover, the court of appeals decision here was based not only on the original trial record as, for example, the case would have been on direct review in *Massaro*, but also the record established both in the state and federal post-conviction proceedings. Based on that record, it was apparent to the court of appeals that Frazier's trial defense counsel knew about Frazier's head trauma, had chosen not to investigate further after being denied an independent expert by the trial court, and had nonetheless failed to introduce any mitigating evidence at trial.

The Sixth Circuit noted that Frazier's post-conviction experts identified a "significant history for head trauma" to Frazier's brain, and that the expert reports suggested a correlation between Frazier's head injury and his criminal conduct. Pet. App. 20a-21a. Recognizing that Frazier's trial counsel had reviewed his medical records and clearly knew about his brain injury at the time of trial, the Sixth Circuit concluded that no "reasonable attorney who saw the medical records indicating Frazier's brain injury would have declined to investigate the matter." Pet. App. 21a.

As the Sixth Circuit noted, the result in the present case is consistent with this Court's recent decision in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In that case, this Court reversed the Fourth Circuit and determined that trial counsel's performance was constitutionally ineffective where they failed to fully investigate the defendant's life history despite the fact that they had two reports that indicated avenues for uncovering possible mitigation evidence. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In *Wiggins*, this Court noted that defense counsel relied solely on a pre-sentence investigation report and a Baltimore Department of Social Services report on defendant and that defense counsel failed to conduct any further investigations despite the fact that these reports suggested that defendant had a history of emotional difficulties and parental abandonment. *Id.* at 2537. This Court concluded that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses" and that defense counsel's failure to investigate mitigation evidence thoroughly "resulted from inattention, not reasoned strategic judgment." *Id.*

Regarding *Strickland's* presumption of reasonableness, this Court noted in *Wiggins* that the state court "appears to assume that because counsel had *some* information with respect to petitioner's background...they were in a position to make a tactical choice not to present a mitigation defense." *Id.* at 2538. "In assessing the reasonableness of an attorney's investigation, however," this Court continued, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* This Court concluded its *Strickland* analysis by stating that the state court's deference to defense counsel's strategic decision not "'to present every conceivable mitigation

defense,' despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation" was an objectively unreasonable application of *Strickland*, thus warranting *habeas* relief under 28 U.S.C. §§2254(d), (e). *Id.* at 2538-2539 (quoting *Wiggins v. State*, 724 A.2d 1, 16 (Md. 1999)).[2]

This is precisely the analysis that the Sixth Circuit conducted in assessing the state court's application of *Strickland* to the performance of Frazier's trial counsel. Just as it was in *Wiggins*, the state court's deference to Frazier's trial counsel in the instant case was an objectively unreasonable application of *Strickland*. The Sixth Circuit was therefore entirely justified in granting *habeas* relief.

The above discussion similarly disposes of Petitioner's argument that the Sixth Circuit's decision will fundamentally alter and increase *habeas* litigation. Pet. 16. Contrary to Petitioner's claim, the Sixth Circuit has simply not adopted a "reverse presumption" for ineffective assistance of counsel claims, and 28 U.S.C. §2254(e) remains unaffected in its allocation of the burden of proof and the standards under which evidentiary hearings may be granted. The Sixth Circuit correctly cited the *Strickland* and AEDPA standards and applied them in this case in a manner consistent with this Court's precedents. In fact, there have been at least three subsequent decisions in the Sixth Circuit that have denied *habeas* relief based on the circumstances in those particular cases for ineffective assistance under the *Strickland* standard. *See. e.g., Campbell v.*

[2] The State suggests that the Sixth Circuit may have misconstrued *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), to not require evidentiary hearings in these cases. Pet. 11 n.1. That argument is incorrect, the panel never cited *Wiggins* on this point and indeed never addressed a State argument regarding the need for an evidentiary hearing because the State never raised one. Moreover, as discussed above, the decision in this case was based on more than just the state trial record. As the Sixth Circuit itself has noted, it has both remanded for evidentiary hearings or granted writs depending on the case. *Johnson v. Bell*, 344 F.3d 567, 573 (6th Cir. 2003).

United States, ___ F.3d ___, No. 03-1178, 2004 WL 833611, *5 (6th Cir. Apr. 20, 2004) (Gilman, J.) (applying *Strickland* presumption to deny relief); *Smith v. Mitchell*, 348 F.3d 177, 205-06 (6th Cir. 2003) (distinguishing *Frazier*); *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, ___ U.S. ___, 2004 WL 377000 (Apr. 26, 2004). These results fatally undermine the State's claim that the court of appeals in this case fundamentally altered the *habeas* landscape in the Sixth Circuit with respect to *Strickland* claims.

II. THE SIXTH CIRCUIT'S DECISION DID NOT ADOPT A NEW RULE WITH RESPECT TO RESIDUAL DOUBT MITIGATION THAT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner next urges (Pet. 19) this Court to grant review in order to address the Sixth Circuit's treatment of residual doubt as a mitigation theory. The State claims that the Sixth Circuit has ruled out the application of residual doubt as a mitigation theory in all cases as a *per se* rule. Once again the State distorts the court of appeals' holding and exaggerates its possible reach – this time in an attempt to manufacture a circuit court conflict that simply does not exist. The panel, again in the circumstances of this case, determined that defense counsel's mitigation performance was constitutionally deficient.

A. The Sixth Circuit Panel Did Not Adopt A *Per Se* Rule Against the Use of Residual Doubt at Mitigation.

The panel did not adopt a rule that arguing residual doubt is, in all cases, invalid. There was no *per se* rule announced by the panel that applies in all cases. This is apparent from the opinion itself.

The panel specifically cited the Sixth Circuit's previous decision in *Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir. 2000), which had concluded that under the circumstances of that case, residual doubt was a reasonable strategy. Pet. App. 22a-23a. The panel in this case cited and distinguished *Scott* – it did not overrule or purport to alter

it in anyway – which surely would have happened had the panel in this case announced a new *per se* rule.

The State makes much of the panel's notation that residual doubt is no longer a valid mitigating factor as a matter of Ohio state law. But as shown above by its acknowledgment of *Scott*, the panel did not regard this state law issue as dispositive on the *Strickland* question in this case. In fact, residual doubt is no longer a mitigating factor under Ohio state law. Pet. App. at 22a (*citing State v. McGuire*, 686 N.E.2d 1112 (Ohio 1997)). The Ohio Supreme Court further held in *State v. Bey*, 709 N.E.2d 484 (Ohio 1999) that *McGuire's* holding regarding residual doubt applies retroactively.[3]

But this is now beside the point. The argument over the residual doubt strategy in this case overlooks two critical considerations that apply in this case: first, the structure of Ohio's death penalty scheme in cases like this one, and second, the availability of other mitigation arguments and the putative potential negative ramifications of pursuing such alternate theories of mitigation.

Under Ohio's death penalty scheme, the aggravating circumstances have already been proven beyond a reasonable doubt when the mitigation phase of the trial begins. Ohio Rev. Code §2929.04. Thus, in Ohio, a capital defendant at the penalty phase has already been found guilty of a death specification and should generally present *some* mitigating evidence, if he has any, in order to avoid the death penalty; otherwise, it is

[3] The State cites *State v. Smith*, 731 N.E.2d 645 (Ohio 2000) for the proposition that trial counsel's performance is not constitutionally ineffective where it pursues a residual doubt strategy at a penalty phase prior to 1997 in Ohio. However, *State v. Smith* is distinguishable from this case. Namely, defense counsel in that case presented numerous witnesses during the penalty phase, including defendant's wife, mother, and psychologist. *Id.* at 649-50. In *Smith*, residual doubt was only one of many types of evidence presented for mitigation at the penalty phase.

practically guaranteed that the aggravating circumstances will outweigh the (non-existent) mitigating factors. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999) (under Ohio's capital scheme, "a capital defendant found guilty of a death specification has to present *some* mitigating evidence in order to avoid the death penalty"), *cert. denied*, 528 U.S. 946 (1999); *see also Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir.), *cert. denied*, 525 U.S. 929 (1998). In the case at bar, the sum total of the evidence presented by defense counsel at mitigation was an unsworn statement by Frazier denying his guilt. Pet. App. 19a. The panel determined that Petitioner's lone unsworn statement was inadequate in this case in light of the availability (as discussed below) of substantial medical, psychological, and social evidence that defense counsel failed to investigate and present, it was objectively unreasonable for defense counsel to rely on Frazier's unsworn statement to be weighed against the evidence of guilt and aggravating circumstances that had been proved beyond a reasonable doubt by the prosecution.[4]

B. The Panel's Decision Does Not Create a Circuit Conflict.

Petitioner suggests that the Sixth Circuit's decision conflicts with the decisions of other courts of appeals. Pet. 21. But that argument is based solely on the false premise that the Sixth Circuit has created a *per se* rule against the presentation of residual doubt arguments in all cases in the circuit. As shown above, in light of its acknowledgment of Sixth Circuit caselaw coming to different conclusions, the panel created no such rule. In any event, the cases that Petitioner cites are easily distinguishable from the case at bar, and a close comparison of them to the present case makes plain that the Sixth Circuit has created no such *per se* rule as Petitioner suggests.

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[4] It should be noted that even with respect to cases from Ohio, the panel did not adopt a *per se* residual doubt rule, as shown by its discussion of *Scott*.

Petitioner notes that in *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1513 (Mar. 1, 2004), the Eleventh Circuit held that defense counsel was not ineffective where it pursued a residual doubt argument at mitigation over other alternate theories, thereby "rejecting" the approach that the Sixth Circuit adopted in the present case. Pet. 22. In *Parker*, however, defense counsel conducted a thorough investigation into alternate mitigation evidence and came to a reasoned conclusion that developing and presenting such alternate evidence would either be ineffective as a mitigation strategy or adverse to the defendant. Nevertheless, in the end, during the penalty phase defense counsel put the defendant's mother on the stand and introduced letters commending the defendant for his work in a "scared straight" anti-drug program in addition to appealing to any lingering doubts of the defendant's guilt. *Id.* at 782. Thus, on these facts, the Eleventh Circuit concluded that the petitioner was not entitled to relief. That decision, however, did not announce a legal principle or rule that puts it in conflict with the Sixth Circuit.

Similarly, the second case cited by Petitioner (Pet. 22), *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), *cert. denied*, ___ U.S. ___, 2004 WL 717262 (2004), is distinguishable. Petitioner notes that the Tenth Circuit found reasonable defense counsel's decision not to introduce evidence of defendant's organic brain syndrome during the penalty phase but to instead argue residual doubt. Pet. 22, 23. In *Bryan*, the defendant himself vigorously rejected the use of mental health evidence. *Bryan*, 335 F.3d at 1223. Distinguishing the facts of *Bryan* from those of *Wiggins v. Smith* (discussed above), the Tenth Circuit noted that defense counsel in *Bryan* (i.e., the fourth attorney) was "fully aware of defendant's history of mental illness," concerned that the testimony

of a psychologist "might do more harm than good during the penalty phase," and "conscious of his client's consistently expressed refusal to rely on mental health evidence." *Bryan*, 335 F.3d at 1224. Defense counsel in *Wiggins*, in contrast, "had conducted a plainly inadequate investigation, and because copious and powerful mitigating evidence would have been discovered if an adequate investigation would have been conducted, the court concluded that counsel's failure to present mitigation evidence during the penalty phase was not insulated from review as a strategic decision and was, in fact, unreasonable." *Id.* at 1224, n.25. As with *Parker*, the decision of Bryan's defense counsel is the kind of strategic choice that, under *Strickland*, is "virtually unchallengeable." *Id.* (quoting *Wiggins v. Smith*, 123 S. Ct. at 2535).

Consistent with *Parker* and *Bryan*, and contrary to Petitioner's assertions, nowhere does the Sixth Circuit suggest that presenting residual doubt over mental health evidence during the penalty phase is in every case irrational. The Sixth Circuit acknowledged that in some cases, presenting certain mitigating evidence at the penalty phase could backfire, opening the door to evidence bearing even more poorly on the defendant. Pet. App. 22a-23a. But the Sixth Circuit found that "[n]o such concerns could have justified the approach in the present case, however, where the jury had already heard considerable evidence about Frazier's rape of Skiba." *Id.*

Additionally, the Sixth Circuit suggests that defense counsel could have satisfied *Strickland* had it, at a minimum, "compared [Frazier's medical] records with the medical literature on brain damage, elicited information from Frazier himself about the injury and its effects on him, or presented the records on Frazier to someone who could competently evaluate them." *Id.* at 21a-22a. Had counsel conducted such an investigation and, based

on its judgment of the efficacy of the resultant evidence, decided to present only residual doubt at the penalty phase, the Sixth Circuit may well have viewed counsel's decision as reflecting a rational trial strategy that is owed deference under *Strickland*. As this Court stated in *Strickland*, however, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690, 91. And, as the Sixth Circuit noted, the state has not challenged the contention that trial counsel could have developed additional information.

Thus, echoing this Court's holding in *Wiggins* when presented with similar facts, the Sixth Circuit correctly concluded that no "reasonable attorney who saw the medical records indicating Frazier's brain injury would have declined to investigate the matter," and that consequently the state court's determination that Frazier's counsel performed competently was "not simply erroneous, but unreasonable." Pet. App. 21a.-22a., 26a. (cf. *Wiggins*, 123 S. Ct. at 2542 ("In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*.")).

The Sixth Circuit's conclusion regarding the negative evidence already in front of the jury by the time that the mitigation phase had started also directly rebuts Petitioner's argument that the Sixth Circuit's decision conflicts with *Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002). There, the Ninth Circuit held that trial counsel may reasonably focus on residual doubt where raising alternative mitigation evidence would allow the State to introduce negative rebuttal evidence. In fact, Petitioner implicitly acknowledges that the Sixth Circuit's decision "conflicts" with *Williams* only "to the extent that the Sixth

Circuit failed to consider the impact of rebuttal evidence against Frazier." Pet. 25. As the Sixth Circuit's decision makes plain, though, that court in fact did consider the impact of such evidence against Frazier and concluded that, under the Ohio capital scheme and the facts of this case, it could not possibly justify the failure to investigate and present mitigation evidence regarding Frazier's brain injury. In this regard, then, the Sixth Circuit's decision is entirely consistent with *Williams*.

In sum, the cases cited by the State, which deny *habeas* relief to petitioners, are all distinguishable, given the facts and circumstances unique to those cases, from this one. The Sixth Circuit's opinion is devoid of broad legal pronouncements that would put it in conflict with other courts of appeals. That different results have occurred in different cases does not make this case appropriate for this Court's review.

III. THIS CASE IS NOT A GOOD VEHICLE FOR REVIEW.

Finally, the substantive arguments against the merits of the State's petition for writ of certiorari aside, this case is simply not a good vehicle for this Court to address the Constitutional issues regarding ineffective assistance of counsel. The Sixth Circuit granted relief to Respondent on the grounds that he did not receive constitutionally mandated effective assistance of counsel at his mitigation phase. That particular ground for relief has been the subject of many decisions of this Court. Petitioner has given no compelling reason why the present case stands out as distinguished from any of these.

Importantly, although the Sixth Circuit granted Frazier a conditional writ of *habeas corpus* based on the ineffective assistance of his trial counsel during the penalty phase, the panel's decision made it clear that there was such pervasive prosecutorial misconduct throughout both the guilt and penalty phases that had the panel considered

Frazier's claim of prosecutorial misconduct in the first instance, it "might be persuaded that [Frazier] was denied a fundamentally fair trial." Pet. App. 18a. Particularly egregious were the prosecutor's repeated references to the victim's character during his closing and rebuttal arguments during the guilt phase and the prosecutor's use of an empty chair to "represent" the victim during closing arguments. *Id.* at 17a, 18a. Indeed, even the dissent concurred in the majority's treatment of the prosecutorial misconduct issue. *Id.* at 36a.

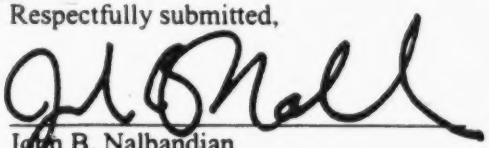
Were this Court to grant Petitioner the writ of certiorari and hear this case, these guilt phase episodes of misconduct would be combined with the even more frequent and more egregious instances of misconduct at the penalty phase. Thus, given the panel's already skeptical view of the prosecution's conduct at the guilt phase alone, there is a likely possibility that Respondent will achieve the same result on remand to the court of appeals based on prosecutorial misconduct. At this point, it makes no sense for this Court to grant review of this case.[5]

[5] It should also be noted that the panel declined to consider numerous of Respondent's other claims, given its holding. Pet. App. 32a-33a.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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(3) Filed

No. 03-1382

In The Supreme Court Of The United States

STEPHEN J. HUFFMAN, Warden, *Petitioner*,

v.

RICHARD M. FRAZIER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

The Petitioner demonstrated in his opening brief that the Sixth Circuit decision here adopted a flawed capital habeas framework that conflicts both with this Court's jurisprudence and with opinions from three other circuits. In particular, the Sixth Circuit reversed the time-honored and well-established presumption of adequate representation this Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)—presuming instead that counsel's investigation of mitigation evidence was inadequate, despite a complete lack of record evidence regarding the scope of that investigation. Compounding its disregard for this Court's precedent, the court below also adopted, in conflict with at least three other circuits, what amounts to a per se requirement that counsel prefer a brain damage strategy during mitigation (if one is available) over a residual doubt strategy, even if counsel believes it is imprudent (for instance because it opens the door for the prosecution to present prior criminal conduct). Each of these conflicts, by itself, wreaks havoc on the capital habeas framework, and thus independently justifies certiorari; taken together the need for prompt review is only more apparent.

In his opposition, Respondent dispels neither the existence, nor the significance, of these conflicts. With regard to the first, he argues that the Sixth Circuit did not, in fact, reverse the presumption. Opp. at 5. To be sure, the court below did begin its analysis by citing *Strickland*. But, the panel nonetheless held that counsel's investigation was inadequate, *despite no evidence one way or the other on the scope of the investigation*, a result clearly demonstrating that the court flipped the *Strickland* presumption. Nor does Respondent's suggestion that *Wiggins* somehow ameliorates this conflict, *see id.* at 8, survive close scrutiny. Indeed, if anything, it only demonstrates even more clearly why review is necessary here to provide further guidance on *Wiggins*' scope.

Respondent attempts to avoid the second conflict above by misstating Petitioner's argument. He suggests that the circuit cases Petitioner cited in his opening brief to demonstrate the conflict, *see* Pet. at 21-24, are inapposite because in those cases counsel had undertaken an investigation before deciding to rely on residual doubt. *See* Opp. at 13-14. The point, though, is that the court below here said that it could not even "conceive of [a] rational trial strategy" where counsel would choose residual doubt over brain damage evidence during mitigation. *See* App. A at 21a. That is, while the Tenth and the Eleventh circuits have expressly approved decisions by counsel *not* to present brain damage evidence, *see* Pet. at 21-23, the panel here announced that such a choice is virtually per se irrational (and thus ineffective assistance). Nor does Respondent's reliance on *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), *see* Opp. at 10, save his argument. While it is true that in that case the Sixth Circuit approved a residual doubt strategy, it did not do so in the face of brain damage evidence. In other words, *Scott* is wholly inapposite to the per se rule at issue here—that in the Sixth Circuit counsel must prefer brain damage evidence over residual doubt. That is the rule the divided panel below announced here, and that is the rule that creates the conflict on which Petitioner relies.

Finally, Respondent's suggestion that review is not warranted because the opinion below "is plainly limited to the specific circumstances presented in this case," *see* Opp. at 1, also fails. Unfortunately, there is nothing in the court's opinion that reflects this limitation. And opinions issued since the petition was filed confirm that the Sixth Circuit does not see it that way. In short, despite Respondent's argument to the contrary, the decision below does in fact represent "a sea change in habeas law," *Id.*, urgently necessitating review, and correction, from this Court.

ARGUMENT IN RESPONSE

I. The Sixth Circuit's Decision, By Reversing The *Strickland* Presumption Of Adequacy, Requires Review By This Court Because It Creates Confusion Concerning The Scope Of *Wiggins*.

The Sixth Circuit's reversal of the presumption of adequacy stems largely from its misunderstanding of this Court's recent decision in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2526 (2003). The court below, and Frazier here, improperly compared this case to *Wiggins*. Yet, *Wiggins* is easily distinguishable in at least three ways.

First and most important, the Court in *Wiggins* knew exactly what Wiggins' counsel did and did not investigate *because his counsel testified on the record as to their investigation*. *See Wiggins*, 123 S.Ct. at 2544-45 (Scalia, J., dissenting) (quoting counsel's testimony). Here, Frazier's counsel never testified *at all*. Thus, in *Wiggins*, the testimony overcame the presumption of adequacy. Here, by contrast, a presumption of *in*adequacy substituted for any evidence at all.[1]

Second, in stark contrast to this case, counsel's strategy in *Wiggins* was borne out of "inattention, not reasoned strategic judgment." *Wiggins*, 123 S.Ct. at 2537.

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[1] In the same vein, Frazier remarkably chides the Warden for not requesting an evidentiary hearing during the course of the lower court proceedings. Opp. at 6. But, Frazier produced no evidence on the extent of trial counsel's investigation. If the Sixth Circuit had followed the presumption of adequate performance, as the district court did, then the Warden would have no need for an evidentiary hearing. Only when the Sixth Circuit made a "sea change," *see id.* at 1, by flipping that presumption, did the Warden raise the prospect of an evidentiary hearing, because only then did he need one.

That is, in *Wiggins*, counsel had actually relied on defendant's social history in mitigation, *see id.* at 2538, but had failed to even prepare a "standard" social history report, clearly a gross error *given the strategy they had selected. Id.* at 2536-37. Here, by contrast, the state appellate court found counsel handled Frazier's case in a "thorough and professional manner. . . during both the guilt and penalty phase of appellant's trial." App. F at 180a. And, counsel's selected strategy, residual doubt, did not require further investigation of brain injury evidence.

Third, both Frazier and the Sixth Circuit failed to recognize that, in *Wiggins*, there was no evidence suggesting "that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Id.* at 2357. Here, however, if counsel investigated—again, we simply cannot know if he did on this record—he no doubt found, as outlined in the Warden's opening petition, a great deal of "counterproductive" rebuttal evidence. *See* Pet. at 26 (listing bad acts that prosecution could have introduced). Thus, this case is less like *Wiggins*, and more like the cases *Wiggins* distinguished, cases such as *Strickland* and *Darden v. Wainwright*, 477 U.S. 168 (1986).

That both Frazier and the Sixth Circuit misapplied *Wiggins* to this case, however, strongly argues for review. Commentators have suggested that *Wiggins* was meant "to signal to lower courts to put more teeth in *Strickland* and tighten courts' notoriously lax monitoring of defense counsel conduct." Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 Colum. L. Rev. 801, 832. "More teeth," however, cannot mean evisceration—the route the court below chose. As this case demonstrates, additional guidance on *Wiggins* is absolutely essential if lower courts are to fortify *Strickland* without destroying it.

II. Frazier Mischaracterizes The Circuit Conflict That This Decision Creates.

A. The Sixth Circuit's Per Se Rule Favoring Brain Injury Over Residual Doubt Conflicts With Two Other Circuits.

In the Warden's opening petition, he noted that review is warranted here, not only because of the new "reverse *Strickland* presumption" that the Sixth Circuit adopted, but also due to yet another split among the circuits. In particular, the court below held that it is per se ineffective assistance for counsel to adopt a penalty phase strategy of residual doubt when a potential brain injury strategy exists. In contrast, both the Tenth and Eleventh Circuits have found the opposite—that residual doubt may be used as a penalty phase defense even in light of brain injury evidence. *See Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (en banc). Frazier responds to this argument by mischaracterizing the conflict and making factual distinctions that actually help to demonstrate the severity of the split.

The per se rule reflected in the opinion below is that it is ineffective assistance for counsel to rely on a residual doubt strategy *over a brain injury strategy*. As the court below stated, "We can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." App. A at 21a. *See also id.* at 26a ("In sum no reason at all has been adduced to justify the failure of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. . . . Nor can we fathom one.").

Frazier responds by arguing that the Sixth Circuit has not created a new "per se rule against the use of residual doubt at mitigation" and relying on *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), to show that the Sixth Circuit has approved of residual doubt as a mitigation defense. *See* Opp. at 10. That is both wholly correct, and entirely irrelevant. The new per se rule is not that residual doubt can *never* be used in mitigation. Rather, the Sixth Circuit's new rule is that residual doubt cannot be used as a mitigating defense *if brain injury evidence is also present*. In *Scott* there is no indication that such evidence was available, thus that case proves nothing about the rule at issue here.

Once the issue is correctly framed, Frazier's attempt to distinguish the Tenth and Eleventh Circuit opinions also fails. He distinguishes *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003), for instance, as a case where defense counsel "conducted a thorough investigation into alternate mitigation evidence and came to a reasoned conclusion that developing and presenting such alternate evidence would either be ineffective as a mitigation strategy or adverse to the defendant." Opp. at 13. Therefore, according to Frazier, that case is inapposite because here Frazier's counsel did not conduct a thorough investigation (or so Frazier and the court below presume), nor reach a reasoned conclusion. *Id.*

But his response again misses the point. The court here found choosing residual doubt over brain injury "irrational on its face" and thus could "conceive of no rational trial strategy" that would elevate residual doubt over brain injury. Yet, in direct conflict, the Eleventh Circuit found the opposite: that court could, and did, "conceive" of a situation where residual doubt could be used *instead of* brain injury evidence. In the Eleventh Circuit, the door is open to use residual doubt instead of brain injury evidence; in the Sixth Circuit that door has been slammed shut.

Frazier's attempt to distinguish *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003)(en banc), fails for similar reasons. He again relies on factual distinctions, claiming that in *Bryan*, in contrast to this case, counsel elected to forego the brain injury evidence because of his client's wishes and concerns that such evidence "might do more harm than good during the penalty phase."[2] Opp. at 13-14. But again, the point is that the Tenth Circuit could fathom a factual situation where residual doubt was more reasonable than a brain injury defense—the Sixth Circuit cannot.

Indeed, in emphasizing factual distinctions, Frazier highlights the problem with the decision here. This Court in *Strickland* recognized that different facts may call for different strategies and warned against creating "performance checklists" for assessing counsel's conduct. *See Strickland*, 466 U.S. at 688-89. The Sixth Circuit's new per se rule is nothing more than just such a performance checklist.

B. In Declining To Consider The Impact Of Negative Rebuttal Evidence, The Sixth Circuit Conflicts With The Ninth.

As the petition noted, the court below also refused to consider the impact of negative rebuttal evidence if the door were opened through a brain injury defense, and, in doing so, it conflicted with the Ninth which requires counsel to consider that impact. *See* Pet. at 24-25. Frazier's only response is his assertion that the Sixth Circuit "did consider the impact of such evidence against Frazier." Opp. at 16. Presumably, he bases that on the passage where the court noted the possibility of criminal history as rebuttal evidence,

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[2] In fact, the *Bryan* counsel's key concern was that the jury might perceive an inconsistency—*i.e.*, arguing actual innocence at trial and brain injury at penalty phase. *Bryan*, 335 F.3d at 1220. This could have been counsel's concern in Frazier's case, as well.

but stated that, "[n]o such concerns could have justified the approach in the present case, however, where the jury had already heard considerable evidence about Frazier's rape of Skiba." App. A at 23a.

But under that approach, concerns about prior criminal history could *never* justify the decision not to present brain damage evidence. During the guilt phase, the jury always hears bad facts about the accused concerning the particular crime being prosecuted. The key point is that a brain damage strategy would have allowed additional bad facts regarding other pre-injury bad acts that included murders and molestation. The Sixth Circuit, in contrast to the Ninth, simply ignored this downside in concluding that Frazier had "everything to gain and nothing to lose by introducing evidence of his brain injury at the penalty phase of the case." *Id.* at 25a.

III. The Sixth Circuit's Decision Has Already Created Confusion Within The Circuit.

While the Sixth Circuit's decision might, at first glance, seem a mere outlier, that has not proven to be the case. In fact, the opinion has already begun to wreak havoc within the Circuit and promises to fundamentally alter capital habeas jurisprudence.

While Frazier in his brief suggests that his case is an aberration by citing a trio of post-*Frazier* Sixth Circuit cases that make little reference to *Frazier*, *see* Opp. at 10, he fails to provide a complete picture. Indeed, one of the three of cases Frazier cites, *Smith v. Mitchell*, 348 F.3d 177, 205-06 (6th Cir. 2003), distinguishes *Frazier* on a point that highlights why this Court should grant certiorari here. In that case, Smith's trial counsel *did call* a psychologist to present social and psychological background evidence during the penalty phase, and the habeas court distinguished *Frazier* as

a case where trial counsel had produced no psychological mitigation. *Id.* Distinguishing the case on this ground, however, only serves to highlight the new requirement in the Sixth Circuit that available brain injury evidence must be investigated *and presented.* And, as for the other two cases Frazier cites, neither involved unpresented brain damage evidence, and one of those was not even a capital case.

More interesting are the cases Frazier *fails* to mention. In *Bigelow v. Williams*, 2004 U.S. App. Lexis 9058 (6th Cir. 2004) and *Hamblin v. Anderson*, 354 F.3d 482, 489 (6th Cir. 2003), both cases decided after the decision here, the Sixth Circuit, relying on *Wiggins*, again seemed to reverse the *Strickland* presumption of adequacy. For instance, in *Bigelow*, the court repeatedly noted that the State—not the defendant—had failed to provide an explanation for trial counsel's failure to investigate an alibi:

- "To our knowledge, the *State has not even attempted to offer a strategic explanation* for Rost's failure to investigate further once he learned of Greenlee's evidence." *Id.* at *25 (emphasis added).

- "Thus far, the *State has given no indication* that Rost did any further investigation after hearing from Greenlee and *has offered no reasoned explanation*—strategic or otherwise—why Rost should not have investigated further at that point." *Id.* at *31 (emphasis added).

See also Hamblin, 354 F.3d at 492 (requiring the warden to provide explanations for defense counsel's trial strategy and finding ineffective assistance even though noting that "the district court did not hold an evidentiary hearing or allow any discovery [and therefore] many details of why counsel failed to investigate are not known"). While the court in *Bigelow* at least vacated the judgment and remanded for additional

evidence on counsel's investigation—something that the court should have done in Frazier's case—the court's mode of analysis in both cases demonstrates that the Sixth Circuit now requires *the State* to prove effectiveness of counsel rather than requiring that the habeas petitioner prove ineffectiveness. *Strickland's* presumption of adequacy has been turned squarely on its head.

The Sixth Circuit's decision below continues a pattern within the Circuit of relaxing the defendant's evidentiary burdens in ineffective-assistance-of-counsel cases and thereby changing the landscape of capital jurisprudence in blatant contradiction to this Court's precedent. Contrary to what Frazier claims, since this decision, rendered only eight months ago, the Sixth Circuit has decided at least two other cases, not including *Bigelow supra*, where the court found ineffective assistance of trial counsel in the penalty phase. *See Powell v. Collins*, 332 F.3d 376, 400-01 (6th Cir. 2003); *Hamblin v. Anderson*, 354 F.3d 482 (6th Cir. 2003). As Judge Boggs has noticed, the Sixth Circuit is in the midst of a disturbing trend of increasingly finding ineffective assistance of trial counsel in the penalty phase. *Mason v. Mitchell*, 320 F.3d 604, 642-43 (6th Cir. 2003) (Boggs, J., dissenting) ("This court has reversed capital sentences for failure to present or to investigate mitigatory evidence on no fewer than seven occasions."). By accepting review of this case, the Court could address this trend by providing guidance on the proper scope of both the *Strickland* presumption and the import of *Wiggins* in ineffective-assistance-of-counsel cases.

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition and reverse the Sixth Circuit's decision.

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